Wage Protection in Matters of Bankruptcy and Insolvency

Canada

Wage Protection in Matters of Bankruptcy and Insolvency

Committee on Wage Protection in matters of Bankruptcy and Insolvency

October, 1981

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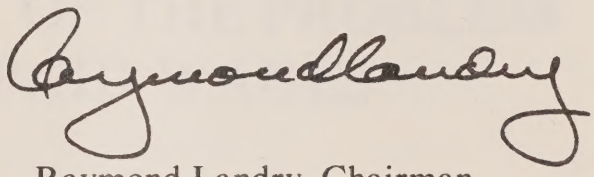
October, 1981.

The Honourable André Ouellet,
Minister of Consumer and
Corporate Affairs,
Government of Canada,

Mr. Minister:

We, the undersigned, members of the Committee on Wage Protection in matters of Bankruptcy and Insolvency, have the honour to submit our Report.



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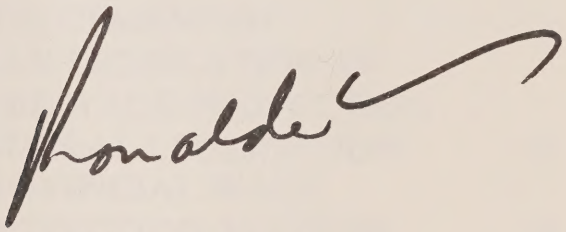

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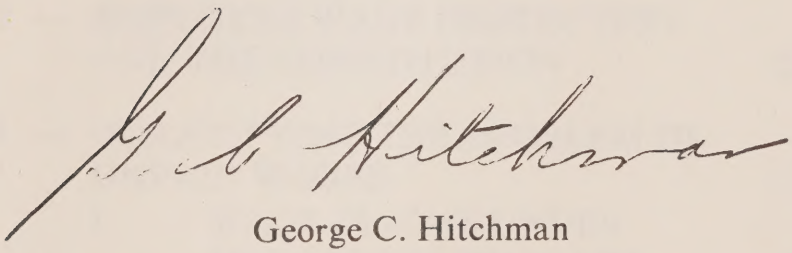

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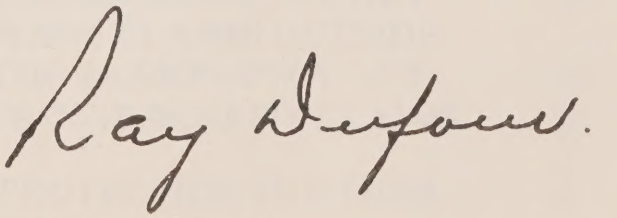

Raymond Dufour

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INTRODUCTION

A. BACKGROUND

0.0.1 The issue involving the nonpayment of wages of an employee in the context of the bankruptcy or insolvency of an employer is not new and has been the subject of much debate in recent years.

0.0.2 Enacted in 1949, the present *Bankruptcy Act*[1] deals with the problem by providing a priority for wage claims over unsecured debts[2]; this wage priority ranks fourth in the order of priority and is limited to wages earned for services rendered during three months next preceding the bankruptcy, to the extent of five hundred dollars.

0.0.3 In 1970, a Committee appointed "to review and report on the bankruptcy and insolvency legislation of Canada" recommended with respect to claims for wages "to restrict the period to three months, but... that the dollar amount be increased to one thousand dollars, to take into account the decreased value of the dollar"[3]. This recommendation may be interpreted, in view of the basic approach of that Committee "to save a fair share of the assets of an insolvent debtor for the ordinary unsecured creditors"[4], as an indication that any solution to unpaid wages should not interfere unduly with one of the fundamental purposes of bankruptcy which is "... the equal distribution of the property of a debtor among his creditors"[5].

0.0.4 On May 5, 1975, Bill C-60[6], was tabled in the House of Commons and proposed to grant a priority to wage claimants over

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(1) R.S.C. 1970, c. B-3

(2) *Id.* s. 107(l)(d)

(3) *Report of the Study Committee on Bankruptcy and Insolvency Legislation*, Canada 1970, p. 121

(4) *Id.* p. 120

(5) *Ibid.*

(6) *An Act respecting bankruptcy and insolvency*, First Session, Thirtieth Parliament, 23-24 Elizabeth II, 1974-75

all other creditors, whether *secured* or *unsecured*, up to a maximum of $2,000. for each employee[7]. This proposal for an absolute priority, however, met with fierce opposition and was rejected by the Senate in its report on Bill C-60, on the basis that it "would be at the expense of a serious disruption of the commercial lending system"[8]. The Senate recommended as an alternative "a government administered fund under the authority of the *Bankruptcy Act* out of which unpaid wages of employees could be paid forthwith upon the bankruptcy"[9].

0.0.5 A number of persons or organizations prepared to support the absolute priority approach of Bill C-60 stated, also, that they were "prepared to look closely at an insurance type scheme which guaranteed unpaid wages and would meet wage claims quickly"[10]. However, there were a number of issues that were raised with respect to the setting up of a wage protection fund; for example, where the Senate recommended a system funded by both employee and employer contributions, others recommended that contributions be levied from employers only as a cost of doing business; in addition, the Senate excluded from coverage such items as vacation pay, severance pay and fringe benefits while others argued that "wages be defined as including all forms of deferred wages" including employer/employee deductions to contributory plans as well as membership fees to trade unions[11].

0.0.6 When officials of the Department of Consumer and Corporate Affairs appeared before the Senate Committee they estimated that "a fund throughout Canada would not exceed $4,000,000.00 if severance pay was excluded"[12]. This estimate was based on ten-

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[7] *Id.* Section 238

[8] For a complete account of the Senate's position see: *Minutes of the Proceedings of the Senate*, No. 142, December 11, 1975, pp. 653-654. The major arguments raised by the Senate were that a borrower would be seriously hampered in obtaining credit; labour intensive industries may find it extremely difficult to borrow funds; an absolute priority does not assure employees of the wage protection intended and it creates administrative problems because Bill C-60 did not set out in specific details the security interest which may be given to the lender.

[9] *Id.* pp. 653-654

[10] See, for example, Canadian Labour Congress brief to the Senate Committee on Banking, Trade and Commerce, December 1975.

[11] Ibid.

[12] Supra footnote 8, p. 654

tative statistics because nowhere within the Department were there comprehensive reports on actual wage losses under bankruptcy. In addition, little if any knowledge concerning the size of the fringe benefit package in bankruptcies was kept.

0.0.7 In the end, the government deferred the establishment of a government administered fund, as recommended by the Senate, and the Honourable Warren Allmand, Minister of Consumer and Corporate Affairs Canada at the time, stated: "If it can be justified, after careful analysis, a funded insurance scheme would clearly be the most desirable solution to the problem of indemnifying employees who suffer losses of wages as a result of their employer's bankruptcy"[13].

0.0.8 Bill S-11[14], the successor to Bill C-60, was tabled in Parliament in 1978, and although it increased the wage claims of employees to $2,000. with an additional $500. for pension and health and welfare contributions, it reverted the status of wage claims in bankruptcy to their previous position as an unsecured claim payable in priority to other unsecured debts. Each successive Bill that has been introduced in Parliament (Bill S-14[15], Bill S-9[16] and Bill C-12[17]) has left unchanged the position of wage claims in the order of priority of payment.

0.0.9 The various Bills tabled in Parliament since Bill C-60 would have given to the Superintendent of Bankruptcy the authority to gather the basic statistical data the government needed to legislate on wage protection. Since none of these Bills have been legislated into law, the basic information has never been available to Consumer and Corporate Affairs Canada.

0.0.10 In its report on Bill C-12, the Senate Committee once again proposed a "Wage Earners Protection Fund" as the best

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[13] News Release, Consumer and Corporate Affairs Canada, NR-78-17, announcing the introduction of Bill S-11 in the Senate.

[14] *An Act respecting bankruptcy and insolvency*, Third Session, Thirtieth Parliament, 26-27 Elizabeth II, 1977-78

[15] *An Act respecting bankruptcy and insolvency*, Fourth Session, Thirtieth Parliament, 27-28 Elizabeth II, 1978-79

[16] *An Act respecting bankruptcy and insolvency*, First Session, Thirty-first Parliament, 28 Elizabeth II, 1979

[17] *An Act respecting bankruptcy and insolvency*, First Session, Thirty-second Parliament, 29 Elizabeth II, 1980

method for protecting the wage claims of employees[18]. The Senate's report makes the point very clearly that the absence of a satisfactory method to protect wage claims is a major deficiency in Bill C-12. While every major section of Bill C-12 presently before Parliament has been revised at some stage the sections dealing with the protection of wage claims have remained unchanged.

0.0.11 It is against this historical background that the Honourable André Ouellet established this Committee to advise the government on how wage protection could best be achieved.

B. APPOINTMENT OF THE COMMITTEE

0.0.12 The Minister appointed as Committee Chairman Raymond Landry, Dean, Faculty of Law (Civil Law Section), University of Ottawa and a former Superintendent of Brankruptcy and as Committee members Ronald Lang, Director of Research and Legislation, Canadian Labour Congress, George C. Hitchman, Deputy Chairman (retired), Bank of Nova Scotia and Raymond Dufour, Vice President, Major et Martin Inc. and former Director General, Quebec Department of Industry and Commerce.

0.0.13 The Committee appointed Jack Gaum as Executive Director, Jacqueline Dubois as Assistant Executive Director, both of the Department of Justice, and Michèle Marois as Secretary for the Committee. Mr. L. G. McCabe, Chief, Economic Analysis Division, Research and International Affairs Branch, Bureau of Corprate Affairs, joined the Committee as an advisor on statistical data gathering and analysis.

C. TERMS OF REFERENCE OF THE COMMITTEE

0.0.14 The following are the terms of reference given to the Committee by the Honourable André Ouellet, Minister of Consumer and Corporate Affairs Canada:

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[18] See Proceedings of the Senate Standing Committee on Banking, Trade and Commerce, No. 16, July 15-16, 1980, p. 10

"Background

1. In most bankruptcies of employers, employees are owed wages and other benefits.

2. The Bankruptcy Bill of 1975 contained a provision granting (s.238) an absolute priority to wage earners for unpaid wages over all assets of their employer including those pledged as guarantee in favour of secured creditors.

3. That provision was removed from subsequent versions of the Bill.

4. The Senate Banking Committee, which examined and reported upon the Bill, recommended that the Bill do not contain such a super-priority and, recognizing the need for the protection of wage earners, recommended, as an alternative solution, the creation of a special insurance fund.

5. Before a ministerial decision is taken as to the most appropriate method of protecting wage earners, a study has to be made of the extent of the problem, the prospective cost of each possible solution and the impact of each option, bearing in mind the social as well as the economic dimensions of the problem.

Terms of Reference

6. The Study Group is to investigate all aspects of each possible method of protecting wages of employees and to report its findings to the Minister.

7. In particular, the Study Committee is to address itself to the following questions:

(a) should a formal bankruptcy of an employer be required for its employees to qualify for protection?

(b) What is a reasonable estimate of the amount of wages that would be covered in each of the first five years of operation of each option?

(c) Which portions of unpaid wages and other benefits including severance pay and unfunded pension plans should be covered under each option?

(d) How should each option be financed?

(e) What would be the possible methods of administering each option, with estimated effectiveness and costs of each one?

8. The Study Committee is not limited to the areas listed above; it is expected that it will explore all avenues of the problem that in its discretion, it feels must necessarily be studied to be in a position to give its advice.

9. The Study Committee is expected to survey the experience of other countries in respect of this question."

D. SUMMARY OF THE COMMITTEE'S ACTIVITIES

0.0.15 The Committee was requested by the Minister "... to report to me its findings as quickly as possible considering that "Bill C-12" is expected to be dealt with during this session of Parliament"[19]. Accordingly, while the Committee did not consider it feasible to generally invite oral or written submissions because of the very short time frame for reporting, it was in possession of a number of submissions made to the Senate Committee during its consideration of "Bills C-60" through "C-12". Furthermore, it also actively solicited particular reports, opinions or information, related to specific areas of concern, from the private sector and from the federal and provincial governments.

0.0.16 The various submissions made to the Senate Committee and the reports of the Senate greatly assisted the present Committee in identifying the objectives to be sought and the form that various alternative solutions might take.

0.0.17 To further evaluate the problem of unpaid wage claims, particularly their extent or magnitude, the Committee requested a data analysis[20] of the bankruptcy files and receivership summary

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[19] News release, Consumer and Corporate Affairs Canada, NR-80-26

[20] CANADIAN FACTS, *The Effect of Bankruptcies and Receiverships on Wage Earner Claims and Losses*, April 1981. See Appendix 1 for "HIGHLIGHTS" of this study.

sheets held by Consumer and Corporate Affairs Canada. In conjunction with this step, contacts were made with certain other federal government departments in the hope that they compiled data pertinent to the evaluation of the problem of unpaid wages.

0.0.18 Questionnaires[21] related to measuring the amount of unpaid wage claims and possible solutions were drawn up by the Committee and directed to trustees from across the country as selected by Consumer and Corporate Affairs Canada on the basis of their insolvency activity. A similar questionnaire[22] dealing with the issue of unpaid wage claims presently outside the scope of the *Bankruptcy Act* i.e. insolvencies, was sent to provincial officials in the labour field. Where time permitted, individual Committee members met with these persons who were asked to complete the questionnaires.

0.0.19 Further to the question of unpaid wage claims that are not presently, but conceivably could be, covered by the *Bankruptcy Act*, the Committee requested a study[23] on the various components of a wage package and their historical development.

0.0.20 Committee members also visited a number of foreign countries[24] which were known to have implemented a "protection fund" for the recovery of employee claims, to find out why a fund was chosen; when it operates; which employees it covers; which employees' claims it covers; how it operates administratively; and what has been its successes and failures[25].

0.0.21 A legal opinion was requested on the status of the United States law in the area of wage protection. Committee members also visited business, legal and accounting firms in that country to inquire as to the state of the problem of unpaid wage claims.

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[21] See Appendix 2

[22] See Appendix 3

[23] Waldie, Brennan & Associates, *Employee Compensation and Bankruptcy*, March, 1981

[24] England, France, Germany, Belgium, Denmark and, in Brussels, officials of the European Economic Community.

[25] See appendix 4 for a sample of the questionnaire respecting foreign jurisdictions.

0.0.22 The Federal Justice Department was also asked to prepare an opinion on the constitutionality of a number of possible solutions to the problem of unpaid wage claims. Certain federal government departments were contacted regarding the costs and administrative issues that might be related to potential solutions.

0.0.23 *Acknowledgement*: The Committee found that it was generally well received by the persons contacted through the foregoing activities and it wishes to express its deep appreciation to those persons, not only for their time and expertise but also for the high priority they gave to the Committee's inquiries in view of its tight schedule.

E. STRUCTURE OF THE REPORT

0.0.24 The report is divided into two Parts; Part I explores the extent of the problem of unpaid wages; Part II examines possible solutions to the problem. The report concludes with the recommendation of the Committee.

PART I

THE EXTENT OF THE PROBLEM OF UNPAID WAGES

INTRODUCTION

1.0.01 Part I attempts to come to grips with the full extent of the problem of unpaid wages in the context of bankruptcy and insolvency; it is divided into four Chapters.

1.0.02 One dimension of the problem is the continued existence of unpaid wages notwithstanding the development of a large body of legislation, both at the federal and provincial levels of government. Chapter 1 briefly outlines this Canadian legislation related to employee protection.

1.0.03 Another dimension of the problem lies in the constitutional constraints that may exist in dealing with the protection of employee wages. Chapter 2 discusses the constitutional structure related to the matter of wage protection generally, and in the context of bankruptcy and insolvency.

1.0.04 Chapter 3 attempts a quantification of unpaid wages from research undertaken for the Committee to retrieve available Canadian data.

1.0.05 Finally, Chapter 4 furthers this quantitative analysis by drawing from the experiences developed in certain foreign countries visited by Committee members.

CHAPTER 1

THE DEVELOPMENT OF CANADIAN LEGISLATION IN EMPLOYEE WAGE PROTECTION.

1.1.01 *Introduction*: The following paragraphs outline the various legislation, both at the federal and provincial levels, having as one of its objectives, the protection of unpaid wages.

I. FEDERAL LEGISLATION

1.1.02 *Origin and Purpose*: Pursuant to section 91 of the British North America Act, 1867, Chapter 3, the Federal Parliament is empowered to enact laws in relation to various matters, including "bankruptcy and insolvency". In 1869, the Parliament of Canada passed an Act dealing with insolvency and replaced it with a new Act in 1875. In 1880 this latter statute was repealed without replacement until the forerunner of the present *Bankruptcy Act* was passed in 1919 (coming into force on July 1, 1920)[26]. The present *Bankruptcy Act* was enacted in 1949[27], coming into force on July 1, 1950[28].

1.1.03 The general purpose of bankruptcy legislation has been originally conceived and subsequently viewed as being twofold:

> (1) to provide a means whereby honest insolvent debtors can be discharged from their debts so that they may have an opportunity to re-establish their individual, personal or corporate commercial lives, and,

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[26] 9-10 Geo. V, Can. s. 1919, c. 36

[27] 13 Geo. VI, Can. s. 1949 (2nd Session), c. 7

[28] Supra, footnote 3, pp. 13-25

(2) to provide a reasonably expeditious and inexpensive means whereby the available property of insolvent debtors can ultimately be distributed to their creditors in an orderly fashion[29].

1.1.04 *The Bankruptcy Act (1919)*: This Act gave wage claims, for a period not exceeding the three months preceding a bankruptcy or assignment, a priority over unsecured debts. Wages had the third rank after fees and trustee expenses and costs of execution creditors.

1.1.05 *The Bankruptcy Act (1919)* placed no limitation on the amount of the wage priority; this was probably a reflection of the fact that wage levels at the time were sufficient only for meeting day-to-day basic necessities.[30].

1.1.06 *The Bankruptcy Act (1949)*: While maintaining the priority over unsecured creditors for wage claims, the 1949 *Bankruptcy Act* introduced a double limitation; where previously wage claims were limited only by the three month period, a further $500. limit was also imposed. An additional $300. for expenses of travelling salesmen was also introduced at this time. Except for these two limitations the law relating to unpaid wage claims under bankruptcy law has remained unchanged for over sixty (60) years.

1.1.07 *Bill C-12*: The time limitation of three months has been deleted from *Bill C-12* while the level of the priority has been increased to $2,000. for wage claims; $600. to cover expenses of salesman with an additional $500. for pension and other employee benefit plan contributions for each employee including salesmen.

1.1.08 *Bill C-12* is an *Act respecting bankruptcy and insolvency* but it does not apply to wage claims in the event of an insolvency unless a formal *bankruptcy* or an *arrangement* is made under the Act. Therefore, receiverships (whether a receiver is appointed by a court or under a contract) are not covered.

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[29] *In re F.W. Daniel & Co. Ltd.*, 16 C.B.R. 21 at 27; *Markis* v. *Soccio*, 35 C.B.R. 1

[30] This is consistent with the fact that benefit compensation, and in particular, the growth in fringe benefit compensation as part of deferred wages, was a later development. See *Supra*, footnote 23.

1.1.09 *Bill C-12* also leaves unchanged the priority of wage claims only over unsecured debts, in the scheme of distribution of a bankrupt's assets. Many briefs submitted to the Senate Committee on Banking, Trade and Commerce, which in part or in whole had something to say about wage protection, pinpointed the "unsecured creditor status" of wages as a major weakness of the *Bill.*

1.1.10 *Other Federal Legislation:* There are a number of federal statutes, in addition to the *Bankruptcy Act*, which offer some form of limited protection for wage claims.

1.1.11 *The Bank Act*[31] of 1913 required prior payment of wage claims where the bank realized a security acquired under section 88. This section is a special form of security for banks making loans to certain classes of borrowers. The new *Bank Act*[32], in addition, contains director's liability to bank employees for six months of unpaid salaries.

1.1.12 As early as 1886, the *Winding-Up Act*[33]" contained a priority for salaries or wages of clerks and other persons employed by a company being wound up. That priority was for a period not exceeding three months and ranked only after the costs, charges and expenses due to the winding-up of the employer company. The present *Winding-Up Act*[34] contains a similar provision.

1.1.13 *The Wages Liability Act*[35] imposes a duty on the federal Crown to ensure the payment of wages of employees of any contractor or subcontractor carrying out public works for the government.

1.1.14 The first *Canada Shipping Act*[36] enacted in 1934, provided a lien for a seaman in respect of his salary. The present Act[37] contains a similar provision.

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[31] 1913, c. 9, s. 88(7)
[32] 1980-81, c. 40, s. 178
[33] R.S. 1886, c. 129, s. 56.2
[34] R.S. 1970, c. W-10, ss. 72, 94, 162
[35] R.S. 1970-71, c. W-1
[36] 1934, c. 44, s. 197
[37] *Canada Shipping Act*, R.S. 1970, c. S-9, s. 198

1.1.15 In the *Companies Act* of 1886[38], it was provided that the directors of a company were jointly and severally liable to employees for their salaries for a period not exceeding one year. A 1902 amendment[39] reduced this latter period to six months.

1.1.16 The present *Canada Business Corporations Act*[40] and the *Canada Corporations Act*[41] contain similar provisions.

1.1.17 Under the *Canadian and British Insurance Companies Act*[42] director's liability for one year's salary has been in existence since its enactment in 1932.

1.1.18 The first *Loan Companies Act*[43] and *Trust Companies Act*[44] were passed in 1914 and their provisions for director's liability have not changed. They are liable for wages in respect of a period not exceeding three months.

1.1.19 The *Cooperative Credit Associations Act*[45] provides, since its enactment in 1952-53, that directors are liable for six months wages.

1.1.20 The *Canada Cooperative Associations Act*[46] enacted in 1970, also contains a provision for directors liability in respect of six months wages.

II PROVINCIAL WAGE PROTECTION SYSTEMS

1.1.21 *General* – Generally, each province has a basic system that requires the payment of certain minimum wage amounts and

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[38] R.S. 1886, c. 118, s. 40
[39] *Companies Act*, 2E VII, (1902), c. 15, s. 71
[40] 1974-75-76, c. 33, s. 114(1)(3)
[41] R.S. 1970, c. C-32, s. 204
[42] 1932, c. 46, s. 35 – R.S. 1970, c. I-15, s. 35
[43] 1914, c. 40, s. 80 – R.S. 1970, c. L-12, s. 85
[44] 1914, c. 55, s. 54 – R.S. 1970, c. T-16, s. 55
[45] 1952-53, c. 28, s. 70 – R.S. 1970, c. C-29, s. 71
[46] 1970-71-72, c. 6, s. 74

that creates mechanisms for their recovery. In all provinces a contract of employment enables employees to bring a breach of contract lawsuit for non-payment of wage amounts provided for in the contract. In addition, the provinces have various forms of legislation related to employment standards, minimum wages, vacations with pay etc. which provide for the payment of minimum wages, overtime pay, pay in lieu of notice and pay for public holidays – amounts which may not be contained in a standard employment contract. These same acts or wage recovery statutes provide either administrative or civil remedies for the recovery of these wage amounts.

1.1.22 Beyond this general system there are a variety of measures which try to ensure that assets will be available for the recovery of these wage amounts. These measures vary from province to province but, generally, they may be summarized as outlined in the following paragraphs.

1.1.23 *Director's Liability for Unpaid Wages*: All provinces have or propose this liability in the framework of provincial companies legislation, which makes a director of the defaulting corporate employer personally liable in respect of the employees' claims for wages. In addition, three[47] of these provide a similar liability in their labour or payment of wages legislation.

1.1.24 *Posting Bonds or Other Securities*: Four provincial jurisdictions[48] have laws requiring the posting of securities for the protection of wages in certain circumstances or at the discretion of the appropriate Minister or Labour Tribunal.

1.1.25 *Employee Attachment of Third Party Debts*: Four of the provinces[49] provide for this remedy in their labour standards or payment of wages legislation.

1.1.26 *Mechanics' Liens*: All provinces have this type of legislation which provide liens for wages against a special holdback fund or property in respect of which work or materials were provided for the purpose of construction or improvement.

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[47] Alberta, Manitoba and Saskatchewan

[48] Alberta, British Columbia, Manitoba and Nova Scotia

[49] British Columbia, Manitoba, Saskatchewan and Nova Scotia

1.1.27 *Other Liens*: All provincial jurisdictions have similar liens for wages in particular industries e.g. woodsmen, warehousemen, miners, etc.

1.1.28 *Statutory Priorities*: For some time, seven provincial jurisdictions[50] have given wage claims judgments a priority over other types of judgments. Various corporate legislation of the provinces (in relation to dissolution, winding-up and insolvency) have given a statutory priority for wages[51]. Through a more recent emphasis on labour (employment) standards legislation, half[52] of the provincial jurisdictions have enacted statutory priorities for wages in the nature of the *Bankruptcy Act* priority.

1.1.29 *Security Interests*: In the absence of a statutory priority for wages or additionally in respect of vacation pay, six provinces[53] have created a security interest by utilizing a lien and charge, statutory trust or statutory mortgage concept.

1.1.30 *Protection Funds*: To the Committee's knowledge, Quebec and Manitoba have legislation enabling the implementation of a fund to guarantee some payment in respect of employee claims. Under the *Quebec Construction Industry Labour Relations Act*[54], l'Office de la Construction du Québec can, in the case of bankruptcy or a winding-up order, reimburse employees for lost salary and become subrogated to the rights of the reimbursed employee. That provinces's *Labour Standards Act*[55] also contains unproclaimed provisions for the setting up of a fund in respect of a more general class of employees.

1.1.31 On April 7, 1981 the province of Manitoba passed regulations for the administration of a "Payment of Wages Fund"[56].

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[50] Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Québec and Saskatchewan.

[51] Alberta, Manitoba, Prince Edward Island, Newfoundland, Nova Scotia, Ontario and Saskatchewan.

[52] Alberta, Newfoundland, New Brunswick, Ontario and Prince Edward Island.

[53] British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

[54] 1970, R.S.Q. R-20, ss. 122(7) and (8)

[55] 1979, S.Q. c. 45, ss. 29(4) and (5), 136, 137, 138

[56] *Payment of Wages Act* SM. 1975, p. 15, c. 21, s. 19 (Regulations in force April 7, 1981)

1.1.32 The foregoing does not pretend to be an exhaustive listing of the various and ingenious ways by which the provinces have sought to protect wage claims in the involvency context[57]. It is only a graphic example of the plethora of legislation which has developed in response to social needs arising from wage losses in the provinces. However, some of this legislation may rest on a very weak constitutional foundation in the context of bankruptcy and insolvency.

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[57] For a more particular listing of provincial legislations, see Appendix 5.

CHAPTER 2

EMPLOYEE WAGE PROTECTION AND THE CONSTITUTION

1.2.01 The power to make laws for Canada is provided by the *British North America Act*, 1867. In part, this is accomplished by the assignment of exclusive legislative authority to the federal and provincial parliaments, pursuant to sections 91 and 92 of the *Act*, in respect of certain classes of subjects or heads of power. Among other subjects, subsection 91(21) of the *Act* grants the Federal Parliament exclusive jurisdiction over "bankruptcy and insolvency" and, section 92(13) assigns "property and civil rights" to the provinces.

1.2.02 While certain aspects of bankruptcy and insolvency may be legislated by the Federal Parliament to the exclusion of provincial subject matters, the previous Chapter illustrates that the legislative objective of protecting wages has both federal and provincial overtones.

1.2.03 By giving wage claims priority over other unsecured debts, the present *Bankruptcy Act* alters what would otherwise be equal property rights for all unsecured creditors of a bankrupt. The courts have rejected arguments of constitutional conflict and have supported this "order of priorities" provision as an integral part of a statute which is in "pith and substance" bankruptcy and insolvency and only incidentally and unavoidably related to a provincial subject matter[58]:

> "The main purpose of a bankruptcy statute is to make a reasonable distribution of the assets of insolvent persons and at every step, almost, there must be interference with the subject matter of property and civil rights within the

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[58] *Parker-Eakins Co.* v. *Royal Bank of Canada*, 3 C.B.R. 211 at p. 215.

province. I should regard it as properly coming within the powers of Parliament to enact, not as ancillary merely to its right to legislate on the subject matter of bankruptcy but as indispensable to effective legislation, laws as to how creditors' claims shall rank and how debtors' assets shall be distributed."

1.2.04 The significance of the Federal Parliament being granted exclusive legislative authority in respect of bankruptcy and insolvency might be drawn from the following statement of the judicial committee of the Privy Council:

> "The abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91..."[59]

1.2.05 While Chief Justice Laskin expressed a similar view in *Robinson* v. *Countrywide Factors Ltd.*[60], he was in the minority of a 5 to 4 decision. The majority decision supported the constitutional validity of, and reliance on, the Saskatchewan *Fraudulent Preferences Act* to set aside a transfer of a bankrupt's property that took place two years prior to the bankruptcy. While the *Bankruptcy Act* limits "attackable" transfers to those occurring within three months preceding the bankruptcy, the provincial law was unlimited in this regard.

1.2.06 Mr. Justice Beetz, of the majority, concluded:

> "The power to repress fraud by avoiding fraudulent conveyances and preferences is an indisputable part of provincial jurisdiction over property and civil rights. The risk of fraud is increased when a debtor finds himself in a situation of impending or actual insolvency and, in my view, provincial laws can, without undergoing a change in nature, focus upon that situation as upon a proper occasion to attain their project. Given their purpose, they do not cease to be laws in relation to property and civil rights simply because they are timely and effective or

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[59] *Union Colliery Co.* v. *Bryden*, (1899) A.C. 580 at p. 588.

[60] (1977), 72 D.L.R. (3d) 500

because Parliament could enact similar laws in relation to bankruptcy and insolvency."[61]

1.2.07 As overviewed in Chapter I, the Federal Parliament almost totally abstained from legislating in the area of bankruptcy and insolvency during the period 1880 to 1919 and it subsequently and presently does not occupy the entire field of wage protection in respect of insolvencies.

1.2.08 Seemingly, provincial legislation regarding property rights can be found *intra vires* where it has been enacted under section 92 of the *B.N.A. Act* and applies equally in all situations, including insolvencies. In this category one thinks of provincial legislation providing for minimum wages, vacation with pay, etc. and procedures for enforcement of these rights. Provincial legislation intended to assure the payment of wages by the creation of a security interest in favour of employees appears unrestricted when enforced against a delinquent but solvent employer. However, once that employer becomes insolvent the possibility of a conflict between a provincial statute and the federal legislation arises.

1.2.09 In the case of a formal bankruptcy, this conflict appears resolved in favour of the federal law as a result of recent cases of the Supreme Court of Canada[62] and the Supreme Court of Nova Scotia[63]. Briefly, these decisions support the view that the creation of a security interest for wages under provincial law does not render the employee a secured creditor under the *Bankruptcy Act* as that would conflict with that employee's unsecured status thereunder:

> ". . . so long as there is *no bankruptcy*, full effect must be given to statutory provisions such as those contained in the Labour Standard Code of this province. . . However, *when bankruptcy occurs*, the provisions of s. 107 of the *Bankruptcy Act* take effect..." (emphasis added)[64]

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[61] *Ibid.*, P. 535

[62] *Deputy Minister of Revenue* v. *Paul Rainville, in his capacity as Trustee of Raymond Bourgault, a bankrupt* (1980) 1 S.C.R. 35

[63] *Re: Black Forest Restaurant Limited* 37 C.B.R. 176, affirmed on appeal (as yet unreported).

[64] *Ibid.*, p. 192

1.2.10 The Minister asked the Committee to consider whether wage protection should be made available in all insolvencies, not just in cases of bankruptcy. One dimension of that question is whether this can be done, constitutionally, in light of the foregoing caselaw comments which distinguish wage protection in bankruptcies as opposed to (other) insolvencies.

1.2.11 It is the Committe's view that the Federal Parliament can constitutionally legislate wage protection for all insolvencies and that the present state of the law is due to the fact that the federal power in respect of bankruptcy and insolvency (related to wage protection) has yet to be fully exercised.

1.2.12 The issue of whether, factually, wage protection ought to be made available under federal laws in all insolvencies is dealt with hereinafter in the Report.

1.2.13 Furthermore, as raised in the first portion of this Chapter, there remains the constitutional restraint that any recommendation for wage protection at the federal level, must be consistent with the major purpose of bankruptcy and insolvency legislation and that any relationship to a provincial subject matter must be "indispensable" to the effectiveness of that federal legislation.

CHAPTER 3

QUANTIFYING THE PROBLEM OF UNPAID WAGES

1.3.01 *Introduction*: The Committee proceeded with a quantitative analysis of the problem of unpaid wages because the choice of a solution and its implementation could be dependent upon the size of the problem. Furthermore, the terms of reference given to the Committee required it to provide a reasonable estimate of the amount of wages that would be covered in each of the first five years of implementation of a solution.

1.3.02 The Committee was initially informed by Consumer and Corporate Affairs Canada that for both 1974 and 1975 total unpaid wage claims against bankrupts' estates were about $1.5 million, $750,000 of which remained unsatisfied after distribution of the money realized from estate assets.

1.3.03 This information, limited to claims under the *Bankruptcy Act*, was not the most up to date. More importantly, however, information on wage claims in all insolvencies, not just bankruptcies, was not available from the Consumer and Corporate Affairs Canada records because it did not have legislative authority to require such information. As previously noted in this report, the various Bills tabled in Parliament since Bill C-60 would have given the Superintendent of Bankruptcy the authority to gather basic statistical data on which to base new wage protection legislation. Unfortunately, none of these Bills have been passed.

1.3.04 Finally, it was the Committee's early understanding that "fringe benefits" in the total wage package have become a more and more important factor in the overall problem of unpaid wages and, therefore, it felt the need to identify and measure these benefits, placing a special emphasis on severance pay and unfunded

pension liabilities. This information, also, was not available from Consumer and Corporate Affairs Canada because they are not amounts which are claimable, under the *Bankruptcy Act*, as a prior unsecured debt.

1.3.05 Accordingly, the Committee proceeded with a quantitative analysis of the problem of unpaid wages under the following headings:

(I) Wage Claims Under the *Bankruptcy Act*.
(II) Wage Claims Outside the *Bankruptcy Act*.
(III) Fringe Benefit Claims.

I. WAGE CLAIMS UNDER THE BANKRUPTCY ACT

A. METHODOLOGY

1.3.06 Because Consumer and Corporate Affairs Canada is charged with the responsibility for bankruptcy policy and administration in the federal government it was a major focus for much of the Committee's efforts to retrieve useful and accurate statistical data.

1.3.07 Initial discussions with Department officials disclosed that reporting under the *Bankruptcy Act* was compulsory and 15 departmental offices across the country held public files on all business bankruptcies. A representative sample of the business bankruptcies over the period 1976- 1980 was drawn from the computer file in order to retrieve information on wage-earner claims and losses for in-depth analysis. A ten percent sample was designed yielding approximately 2,500 bankruptcy files over the five year period.

1.3.08 To assist Consumer and Corporate Affairs Canada in the carrying out of this empirical research, the services of Canadian Facts, a division of the wholly-owned Canadian Company SK/CF Inc., were retained.

1.3.09 The Committee did not anticipate that other Federal Departments had readily available data that narrowed in on the problem of wage claims under a bankruptcy. Nevertheless, the Committee contacted the Federal Departments of Employment and Immigration, Labour, Insurance and Statistics Canada to explore the possibility that some relevant data was in their possession.

1.3.10 To further measure the problem of unpaid wage claims the Committee prepared the questionnaire which it sent to a number of firms that offer trustee services across the country, as selected by Consumer and Corporate Affairs Canada on the basis of their insolvency activity ("trustee questionnaire")[65]. Those firms were asked for any documentation which could assist, generally, in the assessment of the problem and, in particular, for an estimation of the amount of unpaid wage claims made under bankruptcies in respect of which they acted as trustees.

1.3.11 In Quebec, data were also obtained from l'*Office de la Construction du Québec*, where a wage protection fund has been in operation for seven years, and from *La Commission des normes du travail du Québec*, which is presently conducting a sample study of wage losses as they are identified in the trustees' files.

B. RESULTS

1.3.12 The records of the 15 district bankruptcy offices analyzed by Canadian Facts yielded the following profile of average wage claims and losses over the past five years[66].

—Wage claims in bankruptcies were found to be a relatively infrequent phenomenon; they were found in 9.3% of the bankruptcy files examined. This percentage was quite constant over the five years ranging from 11.1% in 1976 to 7.8% in 1979.

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[65] *Supra*. footnote 21

[66] The data captured from the bankruptcy files comprise a 10% representative sample of the 25,305 businesses that went bankrupt between 1976 and 1980. The sample was stratified by year of bankruptcy and by district office (15). Estimates of population figures were generated using a district office within year of bankruptcy matrix. See Appendix 1 for the highlights of the Canadian Facts study.

—Over the five year period, there were an estimated 2,364 bankruptcies with records of wage claims involving 10,440 employees; on an annual basis, this would represent an average of 473 bankruptcies involving 2,088 employees.

—The estimates for the 1976-80 period of the magnitude of the problem in financial terms are as follows:

	wage claims	payments	losses
	$	$	$
"closed" files (828)	1,786,000	406,000	1,380,000[67]
"open" files (1536)	7,639,000	1,739,000*	5,900,000*
	9,425,000	2,145,000	7,280,000

*projected on the basis of pay out results in "closed" files.

—The above data yield average wage claims of $3,987 per bankruptcy and $903 per employee. These average figures are upwardly biased due to the presence of two "open" bankruptcy files whose combined wage claims totalled over four milllion dollars.

—Between 1976 and 1980, the number of bankruptcies involving wage claims, the number of emloyees involved and the value of claims all increased in absolute terms. However, their rates of increase were about the same as that of total business bankruptcies.

—There were no trends in the industrial pattern of business bankruptcies nor of those involving wage claims over the period.

1.3.13 The data gathered in Quebec by l'*Office de la construction du Québec* seem to support and corroborate the findings of the Canadian Facts study. The average wage claims (including wages,

[67] A "closed file" is when a bankrupt firm's assets have been liquidated, the final dividend sheet issued and the trustee discharged.

vacation pay and social dues) represent less than $1,000. per employee, but the number of bankruptcies in the Quebec construction sector seems to be twice that of construction bankruptcies nationally, when employment weights are used as deflating factors. In 1980 there were 223 construction bankruptcies involving 1,600 workers, in Quebec.

1.3.14 The sample study made by la *Commission des normes du travail du Québec* covered 450 bankruptcies from the files of 150 trustees located in Quebec; the first partial results to be issued seem to confirm the findings.

1.3.15 There are a number of variables which would tend to underestimate the actual magnitude of the problem. These are:

(1) For the "closed files" in the Quebec construction industry there were no claims, pay outs or losses because l'Office de la Construction du Quebec operated a wage protection fund.

(2) The presence of other provincial wage protection legislation which, until recent case law decisions, was relied upon rather than the *Bankruptcy Act*.

(3) The substantial number of "fly-by-night" business wind-ups as, for example, in Ontario which estimates that from 300 to 400 employers a year just disappear.[68]

(4) The tendency not to report wage claims in bankruptcies where there are few assets.

1.3.16 Taking the above into account, the data gathered for the committee from the bankruptcy files may only represent between 20 and 50 percent of the unpaid wages that were claimable under the *Bankruptcy Act*.

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[68] These are the figures reported to the Committee by a representative of the government of Ontario.

II. WAGE CLAIMS OUTSIDE THE BANKRUPTCY ACT

A. METHODOLOGY

1.3.17 It was a much more difficult task for the Committee to gather sound statistical data to measure the wage claims and losses which have occurred outside bankruptcies.

1.3.18 Once again the Committee turned to Consumer and Corporate Affairs Canada to see if it was possible to retrieve this information from the receivership summary sheets which are filed with that Department (Form CCA- 1619) and held in Ottawa.

1.3.19 As a supplementary source of information, the questionnaire[69] sent to the selected group of trustee firms also sought information with respect to wage claims and losses when firms are placed in receivership. In addition, trustees were asked for their own observations and assessment of the magnitude of wage claims and losses outside bankruptcy.

1.3.20 Finally, the third possible source of information was the Labour Standards Departments of the provincial governments. A separate questionnaire[70] was prepared which sought statistical data based on the provincial experience and any other study or documentation that could be provided that would aid the Committee in assessing wage claims and losses outside bankruptcy.

B. RESULTS

1.3.21 Unfortunately, none of the sources from which the Committee requested factual information proved satisfactory for the purposes of establishing wage claims and losses outside bankruptcy.

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[69] *Supra.* footnote 21

[70] *Supra.* footnote 22

1.3.22 The data gathered from the receivership record form (CCA-1619) is drawn from an unknown proportion of all receiverships between the years 1978-80. It is therefore impossible to estimate the receivership population characteristics generated by the data collected. From the data received it is possible to draw some observations but nothing more:

—The industrial distribution of receiverships is similar to that of bankruptcies except that the manufacturing sector is more highly represented in receiverships files.

—There are more employees involved in individual receiverships than in bankruptcies, reflecting the greater representation of manufacturing.

—The record forms are incompletely filled out and the number submitted had declined from 453 in 1978 to 228 in 1980[71], reflecting a decreased participation by trustees in supplying information and not a decrease in receiverships.

1.3.23 The questionnaire to the trustees resulted in no quantitative data. However, it was the general view of some that the problem of wage losses in receiverships was not a substantial one for the following two principal reasons; first, many receivers have been successful in convincing secured creditors to pay outstanding wages, particularly where it is necessary to preserve a going concern; second, most directors appear to be very concerned about satisfying unpaid wages out of estate assets to avoid payment pursuant to directors' liability or personal guarantee.

1.3.24 With respect to the provincial questionnaire, empirical data were supplied by six provinces. These data were not drawn from the same time period and differ greatly; they are reproduced in Appendix 7 in annual form.

1.3.25 While in most cases the data supplied by the provinces is incomplete, a few of these jurisdictions have been able to maintain fairly detailed accounts of wage claims and losses in insolvencies within their boundaries. However, the Committee is advised that it is unreliable to take the experience of a single province and

[71] The data from the receivership record form (CCA-1619) is reproduced in Appendix 6

extrapolate from its data to give an accurate national picture, because the economics of the provinces vary so widely.

III FRINGE BENEFITS CLAIMS

A. METHODOLOGY

1.3.26 The final major area of research conducted by the Committee was in coming to grips with what has come to be known as the "fringe benefit" part of the "wage package". The Minister specifically requested the Committee to address itself to the question of "which portions of unpaid wages and other benefits, including severance pay and unfunded pension plans should be covered under each [wage protection] option".

1.3.27 Generally speaking, the definition of "wages" under wage protection legislation is not extended to cover most fringe benefits and, therefore, the Committee realized that employee entitlement to unpaid fringe benefits would not likely appear as claims in the sources tapped for all data on the extent of unpaid wages. This information was, nonetheless, requested from those sources.

1.3.28 While it was not anticipated that specific figures were available in respect of fringe benefit claims, the Committee felt that a general understanding of their potential size could be obtained and would be helpful. To this end, the Committee requested a study[72] of the more common fringe benefits, details of their purpose and the method of their calculation. It is in relation to this latter item, in particular, that the Committee hoped to make some assessment of the likely extent of the problem of unpaid fringe benefits.

B. RESULTS

1.3.29 The questionnaire previously identified was deficient on the subject of fringe benefits although some provinces have researched this matter. Unfortunately, individual figures cannot be applied nationally with any degree of certainty.

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[72] *Supra.* footnote 23

1.3.30 The statistics from British Columbia might suggest that the total loss of fringe benefits would not be large but this appears based on a majority of bankruptcies and insolvencies occurring in the non-union service sector of the economy where fringe benefits are minimal.

1.3.31 The nature of severance pay claims and unfunded pension plan liabilities suggest that the bankruptcies or insolvencies of a few large employers in a given year would significantly alter any attempted estimate of annual fringe benefit losses. Given the increase in the total number of bankruptcies in the last few years[73] and the vulnerability of many firms to the interest rate increases, predictions or estimates would be hazardous.

1.3.32 From the study on fringe benefits it is noted that such benefits comprised 33 percent of the total payroll in 1979/80, as compared to only 15 percent in 1953/54[74]. All indications are that the size of "fringe benefits" as a percentage of the total wage package will continue to increase as they have done historically.

1.3.33 Furthermore, the size of "fringe benefit" claims in insolvency proceedings could very well exceed the foregoing ratio (33% fringe benefits to 67% wages) because such benefits may extend back over a number of years. For example, an employee might become entitled to severance pay equal to a number of days' wages for each year of employment and he may also have rights in a pension plan for those years.

1.3.34 The Committee adopted the Minister's use of unfunded pension plans as a prime example of the unpaid "fringe benefit" problem. Time did not permit the Committee to explore the full extent of this item, particularly, the complexities of pension plan administration. The Committee sought information on potential size with a basic understanding that unpaid fringe benefits in an insolvency primarily resulted from the fact that pension payouts are permitted to be planned on an actuarial basis. The Committee assumes that there are also cases where no actuarial funding was planned and, in an insolvency, the pension plan is entirely devoid of funds.

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[73] Over the period 1976-1980, business bankruptcies have increased from 3,136 to 6,595.

[74] *Supra* footnote 23.

1.3.35 The Committee sees a growing problem with unfunded pension plan liabilities in an insolvency. The growth in private pension plans in Canada has been phenomenal to the point where close to 4.2 million Canadians in 1978 as opposed to 1.8 million in 1960 were covered by a private pension in one form or another[75].

1.3.36 Even without adding the dimension of an insolvency it has been stated that unfunded pension plans will encounter growing administrative difficulties as their payouts increase with inflation and with the growth in the number of beneficiaries. It is anticipated that by the year 2000, the Canadian population over age 65 will have increased to 12% from its present 9%[76].

1.3.37 To date only six provinces have legislation governing the private pension industry[77]. This fact and the prediction that the numbers and complexities of pension plans are increasing leads the Committee to conclude that increased emphasis on the regulation of pension plan administration might reduce the size of the unpaid fringe benefit problem in bankruptcies and insolvencies. Steps taken by the United States in 1974 under the *Employment Retirement Income Security Act* lends support to this conclusion of the Committee[78].

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[75] *Ibid*, p. 53. See also Statistics Canada, *Pension Plans in Canada, 1978*, cat. 74-401, p. 13, 14.

[76] "Unfunded Pension Liabilities 'Increasing'", *Ottawa Citizen*, June 17, 1981.

[77] Ontario, Alberta, Manitoba, Nova Scotia, Quebec and Saskatchewan

[78] *Infra*, Chapter 4, Part I of the Report

CHAPTER 4

WAGE PROTECTION IN OTHER COUNTRIES

1.4.01 *Introduction*: As indicated in the preceding paragraphs, quantifying with any accuracy the extent of the problem of unpaid wages in Canada is practically an impossible task due to the lack of pertinent data. That is why it was felt that the experience of a certain number of other countries could prove to be helpful in our determination of the problem in Canada.

1.4.02 Members of the Committee met with experts in that field in the following countries: The United States of America, England, France, Belgium, Denmark and West Germany. It is only appropriate for the Committee to extend its most sincere appreciation to the persons met in those countries for their excellent cooperation and assistance.

1.4.03 There are basic differences in the approach taken to deal with the problem of unpaid wages, between, on the one hand, the United States of America and, on the other hand, the Western European countries. Although the following paragraphs will give a broad outline of those different approaches, the Committee will not attempt to give a detailed account of those foreign legislations in this complex area.

I THE UNITED STATES OF AMERICA

1.4.04 As is the case in Canada, there is applicable legislation with respect to wage protection at both the state and federal levels.

1.4.05 *State Legislation*: The laws of certain states give employees or certain classes of employees, in the event of insolvency or bankruptcy, a lien for their wages. Those liens to secure

wages, like other liens, are security interests; the *Bankruptcy Code*[79] recognizes those lien claimants as *secured creditors*. In other states, the legislation gives wage claimants a *priority* in the distribution of unsecured assets on the insolvency of an employer; the *Debtor and Creditor Law* of the State of New York and the *Code of Civil Procedure* of California are two cases in point.

1.4.06 *Federal Legislation*: The *Bankruptcy Code* provides a priority for wages over unsecured creditors. It has the effect of suspending the operation of state priority legislation. To the extent, however, that there is no conflict between a state insolvency law and the federal bankruptcy law, the state law remains in operation[80].

1.4.07 Article 507 of the *Bankruptcy Code*[81] provides:

507. "Priorities

(a) The following expenses and claims have priority in the following order:

. . .

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of $2,000 for each such individual.

(4) Fourth, allowed unsecured claims for contributions to employee benefit plans

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of

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[79] II U.S.C. (Public Law 95-598 – Nov. 6, 1978).

[80] *Re Wisconsin Builders Supply Co.* (C.A. 7 Wis.) 239 F. 2d 649

[81] *Supra*, Footnote 79

(i) the number of employees covered by such plan multiplied by $2,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan."

1.4.08 The fourth order of priority relating to fringe benefits overrules the decision of the Supreme Court of the United States in *United States* v. *Embassy Restaurant Inc.*[82] that held fringe benefits such as contributions by the debtor-employer to a union welfare fund were not wages within the meaning of the former *Bankruptcy Act*. A similar decision of the Supreme Court of the United States followed as to the debtor-employer's union contribution to an employee's annuity plan[83]. In the legislative history to the new *Bankruptcy Code*, it was stated that for Congress to ignore, "the reality of collective bargaining that often trades wage dollars for fringe benefits does a severe disservice to those working for a failing enterprise[84]."

1.4.09 The employee benefit plans contemplated within the reach of the fourth priority include health insurance programmes, life insurance programmes, pension funds and other forms of employee compensation that are not in the form of wages[85].

1.4.10 No one to whom members of the Committee spoke in the U.S. expressed concern about loss of wages as such, in either reorganizations[86] or liquidations[87] under the *Bankruptcy Code*. A number of explanations were advanced to demonstrate, however, that this situation is not the product of a sophisticated system of law but rather a result of a number of practical solutions that are applied, notwithstanding the law. For example, if there is a secured creditor, as is usually the case, this creditor will normally want to

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[82] 359 U.S. (1959)

[83] *Joint Industry Board* v. *United States* 391 U.S. 224 (1968)

[84] H.R. Rep. No. 595 95th Cong., 1st sess. 187 (1977) S. Rep. No. 989, 95th Cong., 2d sess. 69 (1978)

[85] *Ibid.*

[86] II U.S.C. Chap. 11

[87] II U.S.C. Chap. 7

keep the business operating so that it may be sold on a going concern basis which is the basis that produces the greatest return. Accordingly, the secured creditor will advance the necessary funds to pay the wages. Also, in some reorganization cases, orders have been made authorizing the immediate payment of wages; this obviates the necessity of employees having to wait for a long time to be paid: the statutory authority for such orders is however, doubtful. Finally with respect to severance pay, where a reorganization proceeding is followed by liquidation, some courts have treated large severance pay claims as administrative expenses that were paid in full, although that approach distorted the statutory order of distribution.

1.4.11 If it is very unusual for wage earners to lose wages, as such, in reorganizations or liquidations because *ad hoc* practical solutions are applied to the problem, there still remains a major concern in the U.S. with respect to the protection of pensions. *The Employment Retirement Income Security Act of 1974*[88] was enacted in part to establish a mandatory system of plans designed to protect participants against loss of benefits in the event the plan is terminated. Although this Act appears to be in need of reform[89], it ensures a certain level of pension benefits under most defined benefit pension plans which are terminated.

II WESTERN EUROPEAN COUNTRIES

1.4.12 The approach taken in many Western European countries to deal with the protection of employees' wages has changed considerably in the 1970's. Prior to this period the laws of those countries were struggling (like Canadian and U.S. laws have been doing until this date), to give greater protection to wage earners by granting them a higher priority over other creditors, including, in some instances, secured creditors or by establishing liens or deemed trusts in favour of employees.

1.4.13 All Member States of the European Economic Community (E.E.C) will be required to comply by 1983 with a recently

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[88] Public Law No. 93-406, 88 Stat. 829

[89] The Committee was told that the American Bar Association is contemplating the formation of a new Pension Plan Subsection composed of labour, insurance and bankruptcy specialists.

issued directive[90] setting minimum standards for wage protection by way of a fund designed to ensure adequate protection for employees in the event of their employer becoming insolvent. After a detailed investigation[91] by the Commission of the E.E.C., it was concluded that "the only way to improve this situation is by ensuring that the outstanding claims of an employee against an insolvent employer are met up to a certain level by institutions which are independent of the financial position of the employer and cannot themselves become insolvent"[92]. Employee wage protection funds have already been set up under national legislation in several Member States[93].

1.4.14 From discussions held with representatives of European Countries[94] the following conclusions may be drawn:

(a) all those countries have set up a fund to cover unpaid wages, including "fringe benefits", with or without a maximum ceiling;

(b) the fund covers not only bankruptcy and insolvency cases but also redundancies and plant closures on a permanent basis;

(c) the funding is provided for by employers only;

(d) the administrative structure is designed so as to ensure quick payments of outstanding wage claims;

(e) all funds are subrogated to the rights of employees and the recovery rate varies from 8% to 50% depending on the type of priority given to wages under bankruptcy laws;

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[90] Official Journal of the European Communities, Council Directive, 20 October 1980, 80/987/EEC, p. 23

[91] See Doc. V/305/1/76 – final: Comparative survey on the protection of employees in the event of the insolvency of their employer in the Member States of the European Community.

[92] Proposal for a Council Directive, Com (78) 141 final, p. 2.

[93] Belgium (1966), France (1974), England (1976), West Germany (1974), Netherlands (1972), Denmark (1972).

[94] England, France, Belgium, West Germany, Denmark.

(f) all funds were created by separate statute in each country to deal with a social problem that was beyond the scope of traditional bankruptcy legislation;

(g) the average amounts paid out of those funds vary from $500. in Denmark to close to $3,000. in France;

(h) out of the total payouts from the funds, a substantial portion was made up of "fringe benefits" claims not traditionnally considered as "wages";

(i) an average of 0.75% of the total work force benefited from the funds on a yearly basis;

(j) the actual administration of those funds is controlled by either a government department or agency, especially with respect to the collection of the levy and payouts, while the verification of the proofs of claims is left in the hands of private trustees or liquidators or persons exercising similar functions.

1.4.15 In sum, those programs are generally well received by the business and labour communities of those countries although there still exists a number of abuses to be corrected and pitfalls to be avoided.

The following are the principal examples of abuses given to the visiting Committee members:

1. Individuals would set up businesses for the sole purpose of creating their own wage claims and then putting the business in bankruptcy;

2. Salaries would be dramatically increased on the eve of the bankruptcy of the business;

3. Related or fictitious persons would be added as employees on the eve of a bankruptcy;

4. Businesses would sustain hopeless operations by encouraging employees to forego wages on the basis that they were protected by a fund.

CONCLUSIONS TO PART I

1.5.01 From the four chapters of this Part, a number of conclusions may be drawn:

1. Notwithstanding the numerous attempts made at the federal and provincial levels to deal with the problem of unpaid wages, the need for wage protection remains a concern of governments.

2. The Federal Parliament has clear authority to legislate wage protection provisions that would apply in other insolvencies as well as bankruptcies.

3. Federal wage protection provisions, if made applicable in all insolvencies, would override the operation of at least some of existing provincial wage protection laws, in the context of insolvencies.

4. While some reliance can be placed on the data gathered with respect to unpaid wages in the context of the *Bankruptcy Act*, such is not the case for unpaid wages in other types of insolvencies and for all fringe benefits.

5. The information gathered with respect to unpaid wages and benefit claims in all insolvencies suggests a potentially large problem primarily due to the larger frequency of receiverships and other insolvencies compared to bankruptcies and to the fact that severance pay and unfunded pension benefit claims may extend back over a number of years.

6. Generally, Western European countries protect wages and many fringe benefits by a government administered and employer financed fund with the result that there is no undue interference with the orderly distribution of assets in an insolvency. They have, however, encountered a number of pitfalls which they are now trying to eliminate while keeping the fund concept intact.

7. The absence of a significant problem of unpaid wages in the United States, under legislative provisions similar to

Canada, appear to be related to the application of a number of practical solutions notwithstanding the law. That country's approach to pension funds invokes regulated funding and insurance of the unfunded portion of pension plans outside the operation of normal bankruptcy and insolvency laws.

PART II

WAGE PROTECTION: AN ANALYSIS OF ALTERNATIVE SOLUTIONS

INTRODUCTION

2.0.01 The preceding Part has shown that at both the federal and provincial levels wage protection is a lasting concern of governments. While the passage of time has brought tremendous changes in circumstances related to the problem of unpaid wages, federal wage protection under the *Bankruptcy Act* has remained virtually unchanged for many years and provincial legislative attempts to alleviate the problem have been subjected to constitutional restrictions.

2.0.02 Part II directs itself to the search for wage protection that will meet the changed times. Chapter 1 will briefly outline the Committee's views as to why employees still deserve special wage protection, although they are only one class of creditors in a bankruptcy or insolvency. Chapter 2 will summarize the major dimensions added to the problem of unpaid wages since it was originally dealt with by the *Bankruptcy Act*. In the context of those changes, Chapter 3 will outline what the Committee sees as valid aims and objectives for wage protection in relation to the problem today and into the future. Finally, Chapter 4 will conduct an analysis of the available options for protecting wages.

CHAPTER 1

WAGE PROTECTION — WHY?

2.1.01 The concept of wage protection in bankruptcy and insolvency likely arose because of essential differences between employees and other creditors of a bankrupt. Basically these differences stem from the fact that the other creditors are better structured to absorb losses as an undesirable but necessary risk in providing goods or services with a view to making a profit. In its *Report*[95], the *Study Committee on Bankruptcy and Insolvency Legislation* emphasized this basic difference between a person in business and an employee:

> ". . . it is relevant to recall that bad debts are anticipated by those in business. A reserve or allowance is made for bad debts as a cost of doing business. This reduces the income tax payable by the credit grantor and has the effect of distributing losses over all of the tax-paying public."

2.1.02 For employees, their jobs are their chief and, perhaps, only source of income. While profit sharing or stock option plans for employees exist in some cases, they are more related to job incentive objectives and wage diversification packages and do not, ordinarily, render those employees partners or co-owner of the commercial enterprise with its accompanying risks.

2.1.03 The ability of some employees to negotiate better wage packages has increased enormously over the years as a result of collective representation[96]. However, unlike some large creditors, those employees, customarily, are not able to obtain protections to

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[95] *op. cit.*, Footnote 3, p. 53

[96] As of January 1980, 3,397,000 persons were members of a union out of a total non-agricultural workforce of 9,027,000, thus representing 37.6% of the total non-agricultural paid workers. Source: Labour Canada, *Directory of Labour Organizations in Canada, 1980.*

assure the payment of the negotiated wages and benefits by requiring, for example, a property security interest or the posting of a bond.

2.1.04 In contrast to all other creditors, employees have little or no access to information regarding the financial affairs of their employer. Particularly, on the eve of an insolvency, they are often guided by rumours and assurances as to the reason for tardy pay cheques. These assurances often result in employees "carrying" their employers longer than other creditors, albeit in the hope of protecting their own livelihood.

2.1.05 Furthermore, where bankruptcy or insolvency occurs, many employees are less likely than commercial creditors to know their rights or have the resources to enforce them.

2.1.06 Finally, delays in recovery of wages, let alone the lack of its certainty, has a greater impact on employees than on commercial creditors. A delay in payment is unlikely to be offset by another source, especially when it occurs during a period in which the employee is unemployed and trying to qualify for a support payment.

2.1.07 For these reasons, the Committee adheres completely to the declared federal objectives that employees' wages deserve special treatment and better protection, especially in view of the relatively recent developments in the Canadian economy which have added new dimensions to the problem of unpaid wages.

CHAPTER 2

A NEW ENVIRONMENT

2.2.01 The identification of valid aims and objectives for wage protection and the analysis of alternative solutions must be undertaken in the context of the changed environment surrounding the problem of unpaid wages. Among the changed dimensions of the problem, the following will be briefly dealt with; the number of insolvencies is on the increase, while dividends to unsecured creditors is on the decrease; there is more reliance on security financing; receiverships are more numerous and the wage package of employees has been modified substantially in recent decades.

2.2.02 *Increase in Insolvencies – Decrease in Dividends*: A significant environmental change to the problem of unpaid wages is the growth in the number of bankruptcies and insolvencies. Although the number of commercial bankruptcies had remained practically stable for a number of years, there was an increase from 3,136 to 6,595, over the five year period 1976-1980[97] suggesting a potential growth in employee claims in the context of the *Bankruptcy Act*.

2.2.03 While bankruptcies are on the increase, dividends paid to all unsecured creditors is on the decrease. The average dividend on all unsecured claims in all bankruptcies was, in 1968, six cents on the dollar[98]; this has decreased to three cents on the dollar for all bankruptcy estates closed in 1980[99].

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[97] *Supra*, 1.3.12

[98] *Report of the Study Committee on Bankruptcy and Insolvency Legislation*, Footnote 3, p. 64

[99] *Insolvency Bulletin*, March 1981, vol. 1, no. 3, p. 116. For all bankruptcy estates closed in calender year 1980, $685,202,300 were declared as liabilities by debtors and $19,031,000 paid to creditors.

2.2.04 While no national data is available for receiverships, knowledgeable persons in the field contacted by the Committee felt that receiverships occurred more often and involved more employees than formal bankruptcies.

2.2.05 Part I referred to the personal views of Canadian trustees that wage claims were generally paid in receiverships. In addition to the fact that there is no valid data to confirm this as a continuing phenomenon, it is a discretionary practice from case to case and from year to year and the resolution of the issues for improving (perhaps enlarging) protected wage claims will no doubt have some influence on this gratuitous practice.

2.2.06 In addition to the fact that the size of a problem can have an influence on the choice of a solution, an economic climate that results in increasing employer instability raises the urgency that an improved protection, even on a temporary basis, be implemented as quickly as possible. The analysis of alternative solutions must include a consideration of a temporary solution if all the elements necessary for a more permanent one are not presently available.

2.2.07 *More Reliance On Security Financing*: Increased security financing also has had an impact on the effectiveness of the form of wage protection originally formulated to deal with the problem of unpaid wages (i.e. wage claim priority over unsecured debts). Times have changed since the first Canadian *Bankruptcy Act* addressed a climate where the number of secured creditors and the amounts of their debts was not significant. In particular, recent changes indicate that security financing continues to accelerate, with the effect of reducing the assets of a bankrupt available to unsecured creditors, including an employee:

> "The banks still take security under section 88 of the *Bank Act* (which specifically requires the bank to pay the wages) but in a great many cases, now also take a separate debenture or security instrument having a floating charge on all the corporations assets. If the corporation becomes insolvent and the Bank realizes on its security, it will do so under the security agreement rather than under

its Section 88 pledge and it is therefore not legally bound to pay the wage claims out of the proceeds.

. . . commercial lending in Canada is not as concentrated in the half dozen major Banks as it has beeen in the past. In addition to the many foreign-controlled Banks which are now doing business here, many of the trust companies and other financial institutions are moving into commercial loans. A number of large suppliers to manufacturers and distributors are now taking similar security for amounts they used to advance on an unsecured basis. . . The major Canadian Banks have traditionally paid all outstanding wages out of the proceeds of their own security but it is probably unrealistic to expect them to continue to do so on a voluntary basis if other competing institutions do not..."[100]

2.2.08 *Receivership*: Coupled with these new methods of financing and particularly with the increased trend of security financing, is the potential growth in liquidations outside the *Bankruptcy Act*. While no national data is available, the views of persons contacted by the Committee, as indicated above, suggest that receiverships occur substantially more often and involve more employees than is the case under the *Bankruptcy Act*.

2.2.09 The increased occurrence of receiverships and secured financing creates two new dimensions to the problem of unpaid wages as dealt with under the *Bankruptcy Act*. First, the present limited wage protection, contained in the *Act* and as proposed under *Bill C-12* presently before Parliament, does not apply to receiverships. This raises the issue of equality of treatment for all unpaid wage claims in the insolvency context throughout Canada. If a better treatment is offered under the *Bankruptcy Act*, wage claimants might be tempted to petition a receivership into bankruptcy for the sole purpose of claiming their debts. Accordingly, the analysis of alternative solutions must include a consideration of whether wage protection should extend to receiverships and other insolvencies as well as proceedings under the *Bankruptcy Act*.

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[100] CICA Submission on Bill *S-9* to the Senate Committee on Banking, Trade and Commerce, March 1980, p. 5, 6.

2.2.10 The second dimension of the problem created by increasing receiverships and secured financing is the decrease in available assets for unsecured creditors, more particularly employees, in the context of an insolvency. Obviously, if more and more of the assets of a debtor are pledged as security for the payment of the debts of specific creditors, one has to look either at other pools of assets or at disrupting these new financing trends to find sources of protection for unpaid wages.

2.2.11 *The Wage Package*: A key dimension to the problem of unpaid wages involves the growth in a typical employee wage package over the years. Part I notes that wage packages have grown from the level where they met only day-to-day basic necessities to a point where they now can involve fringe benefits, including deferred amounts in the form of pensions and retiring allowances and accrued amounts, such as severance pay [101]. This suggests a significant increase in the potential size of unpaid amounts to employees in bankruptcies and insolvencies. In looking at alternative solutions, one must, therefore, address the question of whether protected wages ought to be redefined to reflect this development in the wage package.

2.2.12 *Conclusion*: All of the foregoing strongly suggests that simple changes to the present form of wage protection in the *Bankruptcy Act*, such as an increase in the amount of the wages covered, will leave the employee no better off if the form of wage protection does not adequately facilitate recovery of unpaid wage amounts.

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[101] See *Supra*, 1.3.26 to 1.3.37

CHAPTER 3

AIMS AND OBJECTIVES OF WAGE PROTECTION

2.3.01 The previous chapter concluded with the view that the effectiveness of the present form of wage protection (i.e. priority over unsecured debts) has been greatly reduced over the years because, among other developments, increased security financing now leaves fewer assets to be applied in payment of any unsecured debts (regardless of priority). The choice of a new form of wage protection to overcome this circumstance is the subject matter of the next chapter. Before proceeding, it becomes necessary to establish the aims and objectives for the choice of a new form of wage protection, undertaken in the context of the changed dimensions of the problem originally dealt by the *Bankruptcy Act*.

2.3.02 *All Employees Should Be Covered*: The main test that should be applied is that any individual performing work under the direct supervision and dependence of another person should be covered under a new system of wage protection. This could include "dependent contractors" who are engaged on such terms and conditions that they are in a position of such economic dependence upon an employer, that their relationship closely resembles that of an employee rather than that of an independent contractor.

2.3.03 Any employee or salesman related to the employer and any agent[102] or former agent[103] of the employer would be excluded from the coverage. As examples, the following persons would not be covered: independent contractors, directors and officers of a corporation, individuals engaged, on their own account, in the exercise of a profession, and, generally, any person that has exercised, or that could have exercised, an important influence on

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[102] As defined in section 2 of *Bill C-12*

[103] *Id.*

the management of a firm by reason of his shareholdings in the firm or his relationship with the employer.

2.3.04 *All "Wages" Should Be Protected*: The *Bankruptcy Act*, today and in the past, seems to have protected wages on the basis that they were urgently needed to provide the daily necessities of the unpaid employees and their families. This approach completely ignores changes in the make-up of the wage package that has occurred in recent years. More and more employees trade wage dollars for future benefits; in addition, employees have acquired various benefits, both in relation to legislated labour standards (e.g. vacation with pay) and in anticipation of lost employment (e.g. severance pay). Perhaps, most important are the potentially large unpaid pension rights developed in a climate that has encouraged society to plan for retirement years. To perpetuate the original wage protection coverage under the *Bankruptcy Act* would mean that employees and their families would be protected in respect of amounts earned for a few months yet leave unprotected amounts earned in respect of a number of retirement years.

2.3.05 Even though the amounts of wages protected under the *Bankruptcy Act* seem rather small by today's standards, that protection, in all likelihood, covered the largest part of the amounts earned by employees. The fact that more and more employees trade wage dollars for fringe benefits should not detract from the objective of attempting to protect all wage claims, including fringe benefits. It is the Committee's understanding that the aim of the original *Bankruptcy Act* was to protect practically all wages then outstanding and that such complete protection remains a valid objective to pursue today, albeit, not necessarily by using similar means.

2.3.06 It is interesting to note that the problem of unpaid wages may only occur in respect of employees whose employer is subject to the *Bankruptcy Act* or to other insolvency proceedings. There is a large number of employees whose earnings will never, in all likelihood, be in jeopardy; those employees are, in fact, guaranteed the total payment of their earned wages, including fringe benefits. The most striking example is those employees who derive their earnings from work performed in the public sector, at the federal,

provincial and municipal levels, including Crown agencies and other similar bodies[104].

2.3.07 *All Insolvencies Should Be Covered*: Wage protection ought to be made applicable to bankruptcies and all other insolvencies. With respect to receiverships and arrangements, safeguards against possible abuses should be designed and implemented as discussed below in 2.3.32.

2.3.08 The occurrence of receiverships has reached a level where it is deserving of wage protection; its previous exclusion from the *Bankruptcy Act* appears directly related to the relative small number of secured creditors and the amount of their debts when that *Act* was originally enacted.

2.3.09 *Consistency Of Application Across Canada*: As a valid objective of wage protection, consistency demands that employees of all business bankruptcies and insolvencies be afforded basically equal treatment.

2.3.10 Part I of the Report points out that in the absence of federal provisions, numerous provincial statutes offer different wage protection in insolvency circumstances. Part I, also, concludes that the Federal Parliament has clear authority to legislate different forms of wage protection provisions that would apply in all insolvencies.

2.3.11 The enactment of a comprehensive federal wage protection, in matters of bankruptcies and insolvencies, would have the effect of overriding the operation of at least some of the existing provincial wage protection laws. This result might be unavoidable; however, before proceeding with the setting up of a comprehensive and consistent system of wage protection for Canada, great care will have to be given to the existence of those provincial wage protection laws and everything should be done to coordinate those efforts. Where no agreement can be reached, however, the federal government should not delay in exercising its responsibilities for wage protection in matters of bankruptcies and insolvencies.

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[104] It is estimated that approximately 2 million persons are employed in the public sector and approximately 500,000 in crown corporations out of a total Canadian workforce (including 854,000 unemployed) of 11,026,000. Source: Statistics Canada, *The Labour Force*, May 1981, Cat. 71-001.

2.3.12 *Payment Of Wage Claims Should Be Certain And Speedy*: Two of the characteristics of the wage protection system under the present *Bankruptcy Act* are that the payment of wage claims is far from being certain and, where payment is made, it is anything but speedy.

2.3.13 Whatever form the new system of wage protection should take, it should be characterized by its certainty of payments. Obviously, simply increasing the amounts protected or upgrading the standing of wages in the order of priority over unsecured creditors would be mere lip service. It then becomes necessary to look at other sources of protection: if one considers the tremendous growth in secured financing, one may suggest that employees should receive protection from that source;[105] another possible source of wage protection could consist in the development of an independent and separate pool of assets that can provide the necessary assurance regarding certainty of payment[106]. Chapter 4 of this Part will discuss in more detail the different possible approaches to the problem of unpaid wages in the context of bankruptcy and insolvency.

2.3.14 Where the objective of a new wage protection system is to assure that the total wage package will be paid, it does not necessarily follow that speed is required for the payment of the total wage claim. However, the Committee strongly suggests that very shortly after it is filed, payment should be made of that part of the wage claim that is required to ensure the short term livelihood of the employee and his family. Any unnecessary delay to ascertain the validity of and to pay that part of the claim can be disastrous to a household. In other words, speed in payment is of the essence where the objective is to ensure income maintenance of employees.

2.3.15 With respect to the reimbursement of the other elements of the total wage package, due diligence must be exercised to pay what is rightfully earned and owed to employees. Here it is mainly a question of certainty and not speed.

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[105] A priority for wages over secured creditors was proposed in *Bill C-60*, section 238.

[106] For example, the European, Quebec and Manitoba fund systems.

2.3.16 *Employers Should Bear Cost of Protection*: One of the main proposed objectives of this Report is that employees should receive a more complete and better treatment insofar as their wage claims are concerned. This cannot be done, however, without a price being paid. Theoretically, many varied sources of financing may be looked at to achieve this objective, either singularly or in conjunction with one another.

2.3.17 One may conclude that affording better wage protection is a valid social objective, the cost of which should be borne by the general taxpayer system. Wage protection would then be placed on the same level as Family Allowance, Old Age Pension and other similar social measures. There is a lot to be said about this approach in that it would meet certainty and speed of payment, as well as the other objectives of total coverage and consistency of application across Canada. This would certainly be, on the basis of efficiency and effectiveness, an ideal source for financing wage protection.

2.3.18 However, the Committee believes that wage protection is not on the same level of social objectives as those measures that are already covered by the general tax paying system. Although the risk of protecting wage claims should be spread amongst a larger segment of the population, there does not appear to be any social justification to impose the total burden of protecting wage claims directly on the taxpayer. A source of financing closer to the causes of the problem of unpaid wages must be identified.

2.3.19 Another important factor for excluding general taxation from a permanent solution to the problem lies in the fact that its use would place the greatest part of the burden of protecting wages on individuals, including wage-earners, and substantially less of the burden on corporate employers[107]. In addition, it would exclude from such responsibilities a number of employers who do not pay income tax.

2.3.20 The initial responsibility for ensuring the payment of wages and other benefits lies with the individual employer; when insolvency strikes, the same principle should apply. However, the

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[107] For taxation year 1979, there were 14.7 million individuals' returns compared to 450,000 corporate returns; amounts collected from individuals were $27.9 billion and from corporations, $8.5 billion. Source: *Inside Taxation, 1980.*

dimension of insolvency adds a new factor to be considered since the insolvent individual employer cannot, in those circumstances, assume the responsibility of paying all wages. Then, should the burden be allowed to fall on the employees themselves? Should that burden shift and become a responsibility of the other creditors, whether secured or unsecured? Should all employers, whether or not they may become subject to an insolvency proceeding, assuming a collective responsibility, share in assuring such payments?

2.3.21 Part II of the report discusses the manner in which the present protection of the *Bankruptcy Act* allows the burden of unpaid wages to fall ultimately on the employees as a result of increased security financing and reduced dividends to unsecured creditors (Chapter 2). It also expresses, in Chapter 1, the Committe's view that this should not be the case. The question remains whether employees should be expected to bear at least a portion of the cost of improved protection. In addition to the factors that distinguish employees from their risk taking employers and other commercial creditors, the Committee is of the view that the allocation of any cost of wage protection to employees takes on the nature of self-insurance and, federally, this raises a constitutional issue. Furthermore, there is a distinction between a program to insure income maintenance during a period of unemployment, in respect of which employees are required to contribute, and a program intended to provide payment of amounts legally owed to employees for work performed. Therefore, the Committee does not endorse the allocation of any cost of wage protection on employees.

2.3.22 This Report has also demonstrated that creditors, whether secured or unsecured, should not be called upon to guarantee the *total* payment of unpaid wages because too large a burden would unduly interfere with the normal function and historical objective of distributing assets in an orderly manner.

2.3.23 As to whether all employers should assume some responsibility in the protection of all employees' wages (i.e. not only those on their payroll), stable employers will argue, no doubt, that they are financing the mistakes and bad management of others. While this could be true in some instances, there are many situations

where employers are faced with insolvency problems through circumstances over which they have no control. The Committee believes that, with proper safeguards, a wage protection system would achieve valid social and economic objectives that are in line with acceptable collective business responsibilities and that, therefore, all employers should share in a wage protection system that brings about social justice and equitable treatment for all employees in Canada. In fact, the Committee views this collective sharing of responsibilities as a cost of doing business that will ultimately be shared by all Canadian consumers.

2.3.24 As there are good and bad employers, everything should be done to impose more constraints and responsibilities on bad ones. Directors' responsibility for the payment of wages should be thoroughly enforced; fraud and gross negligence in the performance of management's responsibilities to segregate funds designed by legislation or otherwise for the benefit of employees should be thoroughly investigated and prosecuted.

2.3.25 In sum, the Committee believes that the financing of a wage protection system should be designed so that the burden of such protection falls mainly on all employers, while retaining, under *Bill C-12*, the liability of directors for wages and the priority for employee wage claims over other unsecured creditors.

2.3.26 *Avoid Pitfalls And Constrain Abuses*: Any new system developed to achieve valid and acceptable objectives may include a number of pitfalls that must be avoided in order that the system not fall into disrepute and it must be designed to constrain abuses that may creep in due to the mere existence of such a system. The Committee wishes to draw attention to a number of safeguards that should be built in the wage protection system to facilitate its implementation and to curb as many abuses as possible.

2.3.27 As has been stated previously, a wage protection system should be designed to assure the payment of wages, including fringe benefits, that have been rightfully and legally earned by an employee. Although the Committee does not recommend that a limitation be placed on the amounts payable to an employee, it is concerned by the possibility that this total assurance of payment may have, in certain circumstances, an inflationary effect on the

negotiated demands of employees or on the legislative standards established on their behalf. To avoid such possibilities, a wage protection system could include provisions to constrain the demands by drawing on the historical development of the wage package in the particular firm, as compared to the development in a similar type of industry either inside a region or across Canada. Any deviation from the normal standards established should be rejected on the basis of such deviation. For example, in the manufacturing sector, the wage package in a specific type of manufacturing is determined by the market forces in play and standards are well known. Any provable outstanding claim of an employee should be admissible up to what is normally the standard in that particular industry. The alternative to such an approach would be to set an absolute limit to the amounts payable; this would be a much easier test to apply but would not take into account the equitable approach recommended above which builds on the diversity that characterizes the Canadian economy.

2.3.28 A wage protection scheme should exclude persons related to the insolvent enterprise, as described above in 2.3.03. It should also exclude excessive wages and benefits in relation to the nature of the services rendered where this occurs within the year next preceding the insolvency proceedings.

2.3.29 Any claim in damages for breach of a contract of employment, other than unpaid wages and other benefits related to duties of employment, should also be excluded from coverage.

2.3.30 As noted previously, severance pay and unfunded pension liabilities may be major factors in the size of the wage package claim. All legislative and administrative efforts should be put in place to monitor and control the development of a greater problem in these areas. In other words, all preventive measures should be set in place to constrain this facet of the problem. Federal and provincial legislations should be developed, where required, to ensure that pension plans are more substantially funded and administered by persons independent from the enterprise.

2.3.31 One important dimension to be focused on is the existence of numerous measures that have been in place at the federal and provincial levels to protect wage-earners. Such measures, where

pertinent, should be coordinated and, if possible, made uniform in their administration and application. Where they would no longer serve any useful purpose in the new order of things, they should be abolished.

2.3.32 One last area of concern is the proposed coverage of unpaid wages where no liquidation of an insolvent enterprise takes place, such as in certain forms of arrangements and receiverships. In order not to promote liquidations where a reorganization and sale as a going concern would be the best solution and, in order, at the same time, not to draw on the wage protection system for such purposes, the responsibility for the ultimate payment of the wage package should lie with the person taking over the operations of the firm. Also, in the context of an arrangement, employees should form a separate class of creditors and vote as a group on the proposed arrangement and where they would compromise on their claims, no recourse would exist against the wage protection system. Basically, the existence and design of a wage protection system should neither promote nor discourage the reorganization of a failing enterprise.

CHAPTER 4

CONSIDERING ALTERNATIVES

2.4.01 The preceding Chapter has set out a number of objectives that should be sought in order to provide a better wage protection system for Canada. From the federal perspective there are, generally speaking, two basic methods that could be developed to achieve those objectives. One method is to modify the "order of priority" under the *Bankruptcy Act* by which claims are paid with the proceeds realized from the property of an insolvent employer. For employees, this method would grant wage claims a priority over the claims of one or more classes of creditors so as to improve their rate of recovery. The Committee identified five variations of this method of wage protection; the proposal included in *Bill C-12*, the integration in the *Bankruptcy Act* of provincial statutory liens or charges for wages, the creation of a Federal statutory lien, the granting of a "modified priority" or the enactment of an absolute priority for wages.

2.4.02 A second method of wage protection would provide for the payment of wage claims out of a source of funds separate and apart from the insolvent employer's property. The Committee envisaged three possibilities in this area: the bonding of employers, the use of the "Consolidated Revenue Fund" or the creation of a wage protection fund.

I MODIFICATION TO THE ORDER OF PRIORITY

2.4.03 A brief outline of the variations of both methods of wage protection will be followed by a detailed analysis of the alternatives, in the context of the aims and objectives of the previous Chapter.

2.4.04 The Report previously detailed how the present *Bankruptcy Act*, from its enactment in 1949 to the present, has utilized the scheme of distribution to grant wage claims a priority over the claims of other unsecured debts. *Bill C-12* retains this form of wage protection but increases wage coverage.

2.4.05 One variation of this method could give a wage claim, under the *Bankruptcy Act*, the priority it is accorded under provincial law. For example, the definition of "secured creditor" under the *Bankruptcy Act* could be amended to include an employee holding a provincially created statutory lien (for wages) against the employer's property.[108]

2.4.06 The order of priority of payment under the *Bankruptcy Act* could also be altered by the creation of a statutory lien for wages against the employer's property, retroactive to the date the wages were earned. In this manner, a wage claim would have priority over security interests registered after wages were earned but not over those registered prior to that time.

2.4.07 What is referred to as a "modified priority" would rank a wage claim, under the *Bankruptcy Act*, ahead of all unsecured claims and those claims secured by current or trading assets of the employer.

2.4.08 Finally, an absolute priority, as proposed by "Bill C-60", would position wage claims ahead of all secured and unsecured claims against the insolvent employer, whenever these claims were created or registered.

II SEPARATE SOURCE OF FUNDS

2.4.09 The chief characteristic of this method would consist in the setting up of an independent source of funds to pay wage claims, thereby avoiding reliance on the availability of employer

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[108] Under the present definition of "secured creditor" in the *Bankruptcy Act* this argument was unsuccessfully made in respect of a statutory lien created by the Nova Scotia *Labour Standards Code*, Stats. N.S. 1972, c. 10, s. 84, in the *Black Forest* Case, supra, footnote 63.

property. A first possibility would be the requirement that employers become bonded or carry insurance for the payment of those claims in an insolvency.

2.4.10 A second possible source would utilize the federal taxation and spending power for funding and payment of wage claims through the operation of the "Consolidated Revenue Fund".

2.4.11 A third possibility for independent funding for the payment of wage claims is a wage protection fund which, as previously discussed in the Report, was the recommended solution of the Senate Committee during its consideration of *Bill C-60* and *Bill C-12*. This form of wage protection is utilized in a number of foreign jurisdictions visited by Committee members and, in Canada, it has been put into place in the provinces of Quebec (for the construction industry) and Manitoba. Based on most of those existing schemes, contributions for this type of fund are required from employers alone.

III ANALYSIS OF WAGE PROTECTION ALTERNATIVES

2.4.12 All the alternatives that rely on a modification to the order of priority for the protection of wages share a number of common weaknesses with varying degree. They all are dependent upon the availability of the insolvent employer's assets which, in most instances, are insufficient to meet most claims. All of those alternatives, will not sufficiently guarantee the objective of certainty of payment. This uncertainty is compounded by the increase in secured financing and the reduction of dividends paid to unsecured creditors, as discussed in Chapter 2 of this part.

2.4.13 In addition, while some of those alternatives would enable wage claims to come before certain or all of the secured debts, this would not augur well where the major assets were tied up before the wage debt arose or in labour intensive, low asset industries. Furthermore, delays in realizing or borrowing on the strength of existing security interests to pay employee claims could be the source of numerous and complex litigation amongst secured creditors and create further delays in the payment of the wage claims.

2.4.14 Finally, the aim of protecting all "wages" (i.e. including fringe benefits) would likely evoke even harsher criticism of an absolute priority than when it was proposed in *Bill C-60*. Opponents then argued that a priority over all secured (as well as unsecured) creditors would disrupt the commercial lending system (i.e. it would create a reluctance to extend credit with uncertain security) and this view would no doubt be further pressed if the protected amounts were to be enlarged. Furthermore, as outlined in Part I, fringe benefits may extend back over a number of years of service and therefore, prove to be more substantial than claims for unpaid (hourly) wages. The Committee foresees a potential problem in the uncertainty that might be created for a commercial lender in trying to assess a security interest subject to all wage claims, especially in a labour intensive industry.

2.4.15 As regards the alternatives of seeking a separate source of funds for the payment of wage claims, the bonding option was first discarded. Constitutionally, doubts were expressed to the Committee by the Department of Justice that the courts would extend the concept of bankruptcy and insolvency very far in the direction of preventive legislation. Furthermore, the possibility of frequent litigation could mean uncertain payment and administrative problems and delays.

2.4.16 As raised in 2.3.17 to 2.3.19 the chief argument against the "Consolidated Revenue Fund" is, that it would draw upon the entire tax paying public, rather than employers alone, for its funding. Furthermore, relieving taxation provisions might result in some employers bearing little or no fiscal responsibility for the payment of wage claims.

2.4.17 Constitutionally, the Committee is advised by the Justice Department that there are reasonable grounds to support a wage protection fund, as ancilliary to the regulatory scheme for bankruptcy or a measure to be taken under the general taxation and spending powers of the Federal Parliament.

2.4.18 The setting up of a fund could meet the objectives for a wage protection system as discribed earlier in this report and could, particularly, offer certainty of payment subject only to an administrative time frame for payment. Committee members were

advised that the United Kingdom fund settled wage claims "in a matter of days or at the most three (3) weeks". The Danish administration complained that their payout was too long (4-8 weeks) and had to be shortened through more efficient administrative procedures.

IV COSTING

2.4.19 In the terms of reference the Minister asked the Committee to estimate the cost to administer various options. While, initially, it was not anticipated that any modification to the order of priority under the *Bankruptcy Act* would be too costly because it would only involve a variation of the scheme of distribution, a subsequent discussion of problems in determining the extent to which various security interests should share the cost of paying wage claims raised the issue of additional administrative and judicial functions and costs.

2.4.20 A more serious "cost" of an absolute priority for wage claims, seemingly, would be contained in its probable impact on commercial lending, as discussed in 2.4.14 above. Furthermore, an absolute priority would be distorting the orderly distribution of assets and discriminating against other creditors, which negates the normal function of bankruptcy laws and detracts from its traditional and still to be pursued objectives.

2.4.21 Committee attempts to provide estimated costing of a wage protection fund were stymied due to the lack of sufficient data on all wage claims in all insolvencies. Nonetheless, some exploratory costing work was undertaken, if for no other benefit than to see if a fund system in Canada could theoretically utilize existing administrative sources in the manner of the European models.

2.4.22 The chief detractors of a wage protection fund argue that it has the potential to create an involved and costly administrative structure. In the Committee's view this need not be the case as illustrated by the Western European Funds which utilize existing governmental and private sources and, thereby, minimize costs. For example, in the United Kingdom the Department of Employment undertook the administration of "insolvency payments" as

part of a ("Redundancy") fund for which they were already responsible. Employer contributions for the fund are received as part of the system which had already been collecting national insurance payments.

2.4.23 The United Kingdom system relies heavily on the liquidator, receiver or trustee who is appointed in connection with an employer's insolvency. That person's role "is to issue application forms and leaflets to employees, calculate and agree the entitlement of the employees under the provisions, prepare a statement of the agreed claims for the Department of Employment and to pay the claims from funds supplied by the Department after deduction and remittance of income tax and any other charges where appropriate".[109]

2.4.24 Eight existing regional offices of the Department of Employment were utilized in the United Kingdom system and, overall, only forty additional officers were hired on by that Department for the fund administration.

2.4.25 The Committee is advised that the United Kingdom fund handled 39,000 employee claims in 1979 (work force 22 million) and paid out 11,016,250 pounds sterling in "insolvency" claims for the 1979-80 fiscal year, with a total administration cost of approximately 391,708 pounds sterling.

2.4.26 The Western European systems examined have subrogated their fund to the rights of employees in respect of the insolvent employers' estate. Recovery by those funds ranges from a low of 8% to a high of 50%.

2.4.27 As regards the overall responsibility for the fund's administration the Committee looked to the Superintendent of Bankruptcy, the regional offices of that administration and the trustees, receivers etc. appointed in respect of an employer insolvency. Based on administrative requirements drawn from the United Kingdom example, the Committee was advised that the existing bankruptcy administration could be utilized but specific

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[109] Department of Employment, (U.K.), *Employees' rights on insolvency of employer*; Guidance for liquidators, trustees, receivers, receivers and managers and the official receivers, p. 4

costing estimates could not be provided without particular details as to size (i.e. number of annual claims, average amount of those claims).

2.4.28 Persons contacted in the Department of National Revenue Taxation also advised the Committee that their system could be utilized to collect employer contributions for a fund. This system is used to collect Unemployment Insurance and Canada Pension Plan contributions for other departments.

2.4.29 However, the size of the fund (i.e. The amount to be collected for payments and administration) again became an issue in terms of estimating the costing of a collection administration and the feasibility of same. A fund that is relatively small, even $50 million dollars, would result in the undesirable requirement to periodically collect less than one dollar from 267,113 employers out of approximately 700,000 employers. Furthermore, the Committee is advised that certain substantial costs for setting up the collection for a fund will exist, regardless of size.

2.4.30 Therefore, while there are indications that the creation and administration of a fund need not be high, relative to other government programs, the unknown size of the problem of unpaid wages prevented a complete costing picture. Furthermore, an increase in the administrative burden to businesses and government, even at a relative low cost, may be unwarranted if the size of the remedy far outweighs the size of the problem.

2.4.31 It therefore becomes mandatory to gather the data necessary to disclose the size of the problem and formulate a permanent solution. However, it must be made clear that even if that data discloses a relatively small problem, this would not alter the Committees conclusion that granting an absolute priority for wages under the *Bankruptcy Act* is not the answer. On the contrary, the answer may involve a re-examination of the alternatives for providing a separate source of funds to pay wage claims.

2.4.32 If the data do not warrant an employer levy because the size of the payout of wage claims is not large enough, then the Consolidated Revenue Fund should continue to be the funding source to protect all employees' wages until such time as the establishment of an employer based fund becomes feasible.

CONCLUSIONS TO PART II

2.5.01 From the four chapters of this Part, a number of conclusions may be drawn:

1. The employee today, as always, is deserving of special wage protection on the basis of a situation that is significantly different from the other creditors of an insolvent employer.

2. A solution to the problem of unpaid wages must take into consideration a changed environment due to such things as more numerous insolvencies, greater reliance on security financing, decreased assets being made available to the unsecured creditors of insolvencies and significant developments in the typical employee wage package.

3. A comprehensive wage protection should validly aim to: protect all individuals who were fully dependent on the insolvent debtor for their livelihood, cover all of their unpaid wage and fringe benefit claims against their employer, extend to all insolvencies in Canada, provide consistent treatment in respect of all protected employees and all unpaid amounts, promote certain and speedy payment, impose the cost of protection mainly on employers and invoke the necessary constraints to avoid common pitfalls and abuses to the wage protection system.

4. A permanent solution requires both a determination of the actual size of the problem and the contribution of provincial wage protection possibilities.

5. An improved form of wage protection is immediately required but, in view of the foregoing conclusions, it should be implemented on an interim basis.

RECOMMENDATIONS

PRELIMINARY REMARKS

3.0.01 The history of the protection of wage claims in Canada has been one of incremental change toward greater statutory protection, rather than leaving it to individual civil action under employment contract law. This is evident in a number of federal and provincial statutes.

3.0.02 The Minister of Consumer and Corporate Affairs by establishing this Committee and in the news release announcing its formation has expressed the government's sentiments that there is "... a need to provide better protection for wage earners". The question before the Committee was not whether wages ought to be protected, but rather; what is the best way to protect them? This was the point of reference from which this Committee was launched and the spirit in which it conducted its affairs.

3.0.03 In this respect, a first observation that can be drawn from this Report is the desire of the federal government and the provinces to protect wage claims in bankruptcy and insolvency. To this end, a very large and impressive amount of legislation has been enacted in Canada on the part of the legislators. The sad fact, however, has been that, notwithstanding this massive amount of legislative effort, wage claims are still going unpaid. It would appear that Canada has reached the same stage in its development with respect to wage protection as had the United Kingdom, France, Germany, Denmark and Belgium in the early and mid 1970's.

3.0.04 A second observation is that there has been a tremendous change that has occurred in the financial and economic environment since the 1949 *Bankruptcy Act* which suggests a possible dramatic increase in unpaid wages in the insolvency context.

3.0.05 A third observation is that, despite its numerous attempts as described above in Part I, Chapter 3, the Committee has not

been able to measure statistically what the total lost wages has been under bankruptcy and insolvency; this information is unavailable anywhere in Canada.

3.0.06 A fourth observation is that *Bill C-12, An Act Respecting Bankruptcy And Insolvency*, is presently before Parliament and the Committee was asked by the Minister to recommend to him, during the present session of Parliament, any changes that could be implemented without delaying the passage of that Bill.

3.0.07 In view of these observations and particularly because of the unknown dimensions of the problem and the existence of a large body of laws in the area of wage protection, the Committee recommends implementation of a wage protection system for Canada in two stages. Although, basically, the objectives to be met by the proposed system during the two phases would be similar, the means to achieve them would be different.

A. PHASE I: AN INTERIM SOLUTION

3.0.08 Because of the urgency to improve the protection of wage-earners during consideration of *Bill C-12* now before Parliament and in view of the lack of pertinent data on which to base a permanent recommendation, the Committee recommends the implementation of an interim solution, for a period of three years, under *Bill C-12*, that would be designed along the lines of the aims and objectives of wage protection as described in Chapter 3 of Part II.

3.0.09 The means to achieve those aims and objectives during this three year interim period would be as follows:

(1) The present priority for wages in section 265 of *Bill C- 12* should be maintained for subrogation purposes and to supplement the limited coverage proposed below;

(2) The liability of directors for wages as provided for in section 188 of *Bill C-12* should also be maintained for subrogation purposes and to supplement the limited coverage proposed below;

(3) A separate Part devoted to the protection of wages should be added to *Bill C-12* and provide for the following:

(a) For a period of three years, employee unpaid wages, including fringe benefits, up to a maximum amount of $1,000 should be covered by the Federal Consolidated Revenue Fund (C.R.F.);

(b) The total unpaid "wage package" of an employee should be admissible under the coverage; the total "wage package" would include;
  (i) salaries, fees, commissions and other compensation for services;
  (ii) any amounts withheld by an employer as severance pay, vacation pay, pension and other health and welfare plan contributions; and
  (iii) any rights an employee has in a pension plan administered by the employer;

(c) The employees covered should include any individual who receives wages as an employee (including a "dependent contractor") or as a salesman, except individuals related to the employer and, in the case of a corporation, except a director or officer of the corporation or an individual related to such director or officer or to the corporation;

(d) In order to qualify for the payment of this maximum amount of $1,000. out of the C.R.F., the employee or his representative would be required to file a proof of claim detailing any outstanding claims due to him as wages or other benefits;

(e) The maximum coverage out of the C.R.F. would operate in the following circumstances where:
  (i) an employer becomes subject to a bankruptcy order;
  (ii) an arrangement is made under the *Bankruptcy Act* with respect to an employer and the employee is permanently laid off;
  (iii) a business is closed on a permanent basis by reasons of insolvency and a receiver or other official is appointed by a court with respect to that business.

(f) The detailed proof of claim of an employee would be filed with a trustee, a receiver or other official appointed in respect of the insolvent employer;

(g) Within 10 days of the filing of the claim, the trustee, receiver or other official would determine if the claim is admissible and forward it to the Superintendent of Bankruptcy for payment;

(h) Where a dispute arises in respect to a claim, the trustee, the receiver or other official and the employee or his representative would be required to meet with the regional representative of the Bankruptcy Branch in an effort to resolve the differences;

(i) The procedures provided in *Bill C-12* with respect to the disallowance of a claim or an appeal from a decision with respect to the claim would apply in these circumstances;

(j) Within 5 days of the receipt of the admissible claim, the Superintendent of Bankruptcy would forward to each employee the payment of his admitted claim, up to a maximum of $1,000.;

(k) The Superintendent of Bankruptcy would, during the 3 year period, build up the necessary data out of the claims received for payment;

(l) The Superintendent of Bankruptcy would be subrogated to all the rights of the employee, up to the amount paid, either under the *Bankruptcy Act* or any other federal and provincial legislation or at common law. However, if there are still unpaid amounts owing to the employee for wages over and above the $1,000. claim, the employee's priority would stand ahead of the subrogation rights of the Superintendent;

(m) In order to help finance this partial and interim solution, it is recommended that the Crown in right of Canada retain, for a three year period, its priority as under the present *Bankruptcy Act* and that the application of section 270 of *Bill C-12* be suspended with respect to the Crown in right of Canada for the same three year period;

(n) All the recommendations made above should be subject to a "sunset" clause built in the legislation providing that three years after its coming into force the above interim solution would be replaced by a more comprehensive and permanent solution to the problem of unpaid wages.

B. PHASE II: TOWARDS A PERMANENT SOLUTION

3.0.10 The three (3) year interim solution will provide a phasing-in period in which:

(1) wages will be partially if not wholly protected in some cases;

(2) the badly needed statistics will be gathered on which to base a permanent solution, and;

(3) adjustments can take place within the provinces and the federal government for a smooth transition to a permanent solution.

3.0.11 The Committee recommends that during the three (3) year period meetings take place between the provincial and federal governments to resolve the multitude of administrative, organizational and procedural details that will arise. The multiplicity of federal and provincial statutes should be replaced by a comprehensive wage protection system that would achieve the aims and objectives described earlier in Part II, Chapter 3 of this Report and designed to achieve the following:

(1) All "bona fide" employees should be covered under the new system;

(2) the total "wage package" should be protected;

(3) the new system should cover all insolvencies;

(4) the new system should assure the payment of outstanding unpaid wage claims (certainty of payment);

(5) the payment of outstanding wage claims should be promptly made;

(6) there should be consistency of application of the new system across Canada;

(7) the financing of the system should be made out of a separate pool of assets in order not to disrupt the traditional aim and objectives of the *Bankruptcy Act*;

(8) the new system should be designed to avoid the pitfalls described in this Report and to constrain the possible abuses that any new system may engender.

3.0.12 Finally, the Committee strongly recommends that the federal government assumes a leading role in the setting up of a new wage protection system for Canada in view of its clear responsibility in matters of bankruptcy and insolvency.

APPENDICES

APPENDIX I

CANADIAN FACTS

THE EFFECT OF BANKRUPTCIES AND RECEIVERSHIPS ON WAGE EARNER CLAIMS AND LOSSES

April, 1981

HIGHLIGHTS

BANKRUPTCIES

—2,421 bankruptcies were examined; only 224 (9.3%) involved wage claims at the time of the bankruptcy petition. It is possible, of course, that there may have been a loss of employees on the road to bankruptcy and that the 224 represent the residual.

Using the weighting matrix described in Section B (see Footnote 66), these figures were weighted to 25,305 and 2,364 respectively.

—The wage claims were divided 34 per cent in "closed" files and 66 per cent in "open" files. This means that the base for analysis referring only to "closed" files is not large.

—Examination of the distribution of bankruptcies involving wage claims gave the following picture across the years under review:

	All Bankruptcies With Wage Claims
	2,364
	%
Year of Bankruptcy Petition 1976	15
1977	15
1978	21
1979	19
1980	30

Hence 1980 showed twice the number in 1976. There was no overall regional pattern; some locations showed a situation much worse in 1980 than in 1976, whilst others were less marked.

—The major industries involved over the five year period, in terms of numbers of people as opposed to organizations, were trade 30% (including 21% retail), services 30% (including 17% hospitality), manufacturing 17% and construction 11% of all bankruptcies with wage claims.

These percentages are based on an estimated 8,335 individuals. The documentation contains 454 bankruptcies where the number of people involved was not stated. Taking into account the industries where the "not stated" occurred an estimate of the likely number has been made, increasing the total people from 8,335 to 10,440. Using this latter figure as a new base does not change the top four major industries identified above. However, the percentages alter with manufacturing and construction increasing in importance.

—The average number of employees in the "closed" (generally older) files is 3.4 and in the "open" (generally more recent) files is 4.8. However, too much should not be made of this difference bearing in mind the small bases. The industrial pattern between "closed" and "open" is fairly similar but retail has dropped from 33% in "closed" to 16% in "open" whilst hospitality has increased 12% ("closed") to 19% ("OPEN").

—The value of the wage claims in the "closed" files was $1,786,000, giving an average of $2,260 per bankruptcy (in 4% of cases no value was recorded). The value of the wage claims paid out was affected by -

	Total Closed Files (Weighted)
	828
	%
Payment Made	43
No Payment	57

—The total value of the amount paid out to meet the wage claims was just over $406,400. Hence the loss in wages amounted to $1,380,000 (77% of the claims).

—A number of variables will affect the payment of wage claims; the documentation does not necessarily provide a record of all of them. However, using what information we have suggests that the loss on the current "open" files could be of the order of $5,900,000.

—The average time to close a bankruptcy file with wage claims is about 14 months.

—These claims have occurred within organizations with total liabilities of up to $4,000,000 ("closed" files) and over $8,000,000 ("open" files).

RECEIVERSHIPS

Note:

The bankruptcy files examined were selected by a random procedure from a known population. The receivership records were examined in total but as it is not legally obligatory to file such records the representativeness of those examined cannot be assessed.

—The top four industries were trade 34%, manufacturing 31%, services 16% and construction 7%. This is the same quartet as in bankruptcies but manufacturing takes on a larger role.

—It is known that at least 72% of these organizations had one or more employees. It will be recalled that the bankruptcies generated under 10% still with employees at the time of lodging the bankruptcy petition.

—The average number of employees involved was 18 per receivership which is much higher than for bankruptcies. This is probably due to the higher manufacturing component and possibly loss of employees on the road to bankruptcy.

—The situation – employees and associated monthly payroll – changed dramatically pre – and post – receivership; the average number of employees dropped from 18 to 7 over this period with an accompanying substantial decrease in the value of the payroll. In addition, there is evidence of considerable employee wage and benefit loss prior to receivership.

APPENDIX 2

QUESTIONNAIRE FOR TRUSTEES

NAME AND TITLE: DATE:

ADDRESS:

NAME OF FIRM:

1. Do you have statistical data, supporting documents or studies which could assist us in assessing the problem of unpaid wages?

2. (A) What, in your mind, is an "unpaid wage"?

   (B) Should it include the following items? (If yes, please check).

Wages	( )
pension plan deductions	( )
pension funds	( )
unemployment insurance dues	( )
health and welfare dues	( )
union dues	( )
holiday pay	( )
severance pay	( )
supplemental unemployment benefits	( )
maternity benefits	( )
termination and lay-off notice of payment	( )
wage insurance	( )
disability	( )

   (C) Please comment.

3. (A) In bankruptcy or insolvency cases where wages were unpaid by a corporate employer, what has been the behavior of the directors with respect to those unpaid wages?

(B) What was the value of the wages actually paid by the directors personally or by their insurer?

Yr.	No. of unpaid workers	No. of workers paid by directors	amount paid by directors personally	amount paid by insurer
1975				
76				
77				
78				
79				

4. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of bankruptcies or proposals under the Bankruptcy Act?

Yr.	No. of bankruptcies filed	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

Please comment.

5. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of receiverships?

Yr.	No. of receiverships	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits

1975
76
77
78
79

Please comment.

6. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of liquidations under section 88 of the Bank Act (now article 178)?

Yr.	No. of liquidations	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

Please comment.

7. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of mechanic's lien legislation?

Yr.	No. of liens	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

Please comment.

8. What measures would you recommend to protect the wages of employees affected by the bankruptcy or insolvency of their employer?

9. What influence would a program have on the number of business bankruptcies and the behavior of creditors and debtors?

   (A) In the case of a fund.

   (B) In the case of a super-priority

   (C) In any other case.

10. Would you have other comments to make on the subject of wage protection?

APPENDIX 3

QUESTIONNAIRE FOR PROVINCIAL REPRESENTATIVES

NAME: DATE:

TITLE:

ADDRESS:

NAME OF PROVINCE: TEL.:

1. (A) What is the actual, pending and under consideration legislation within your province designed to ensure the payment of wages?

   (a) Statutes
   Date Title Statute No.

   (b) Pending legislation

   (c) Legislation under consideration

   (B) Do these legislations provide similar protection in the context of bankruptcy and insolvency of the employer?

2. What are your views of the Federal role in matters related to wage protection for employees affected by an employer's bankruptcy such as receiverships, etc.?

3. Does the province have statistical data, studies or supporting documents, which might be useful to our Committee in its evaluation of the unpaid wages?
   If yes, can they be made available and how?

4. (A) In the various applicable legislations, what is the definition of "unpaid wages"?

(B) Does it include the following items? (If yes, please check)

Wages	( )
pension plan deductions	( )
pension funds	( )
unemployment insurance dues	( )
health and welfare dues	( )
union dues	( )
holiday pay	( )
severance pay	( )
supplemental unemployment benefits	( )
maternity benefits	( )
termination and lay-off notice of payment	( )
wage insurance	( )
disability insurance	( )

(C) Please comment.

5. (A) In bankruptcy or insolvency cases where wages were unpaid by a corporate employer, what has been the behavior of the directors with respect to those unpaid wages?

(B) What was the value of the wages actually paid by the directors personally or by their insurer?

Yr.	No. of unpaid workers	no. of workers paid by directors	amount by directors personally	paidamount paid by insurer
1975				
76				
77				
78				
79				

6. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of bankruptcies or proposals under the Bankruptcy Act?

Yr.	No. of bankruptcies filed	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

Please comment.

7. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of receiverships?

Yr.	No. of receiverships	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

8. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of liquidations under section 88 of the Bank Act (Now section 178)?

Yr.	No. of liquidations	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

Please comment.

9. What is your estimate of the amounts of unpaid wages and fringe benefits due to workers as a result of mechanic's lien legislation?

Yr.	No. of liens	No. of unpaid workers	amount of unpaid wages	amount of unpaid fringe benefits
1975				
76				
77				
78				
79				

10. What measures would you recommend to protect the wages of employees affected by the bankruptcy or insolvency of their employer?

11. What influence would a program have on the number of business bankruptcies and the behavior of creditors and debtors?

    (A) In the case of a fund.

    (B) In the case of a super-priority.

    (C) In any other case.

12. Would you have other comments to make on the subject of wage protection?

APPENDIX 4

FOREIGN COUNTRIES QUESTIONNAIRE

NAME: DATE:

TITLE:

ADDRESS:

1. What is the existing legislations that are designed to ensure payment of wages?
   (A) Under bankruptcy legislation:
   (B) Under corporate legislation:
   (C) Labour laws:
   (D) Common Law:
   (E) Other laws:

2. Is the protection of wages afforded only in the context of bankruptcy and insolvency?

3. (A) In the various applicable legislation, what is the definition of "unpaid wages"?
   (B) Does it include the following items? (If yes, please check)

Wages	( )
pension plan deductions	( )
pension funds	( )
unemployment insurance dues	( )
health and welfare dues	( )
union dues	( )
holiday pay	( )

severance pay ( )
supplemental unemployment benefits ( )
maternity benefits ( )
termination and lay-off notice of payment ( )
wage insurance ( )
disability insurance ( )

4. What administrative machinery has been set up to ensure the implementation of the system?

5. How does the administrative system actually operate?

6. Statistics:
   (A) How is the system (or fund) funded?
   (B) What are the annual expenditures out of the fund?
      (i) For administrative costs:
      (ii) For the payment of wages:
   (C) How many employees had recourse to the fund on a yearly basis?
   (D) What is the average amount of the claim of an employee?
   (E) Has the fund a legal recourse against others for payments made to employees?
      (i) Against directors and officers of a corporation:
      (ii) Against the estate in bankruptcy (Receiver, trustee, others)

7. Are there any documents pertaining to this problem that could be made available?

   Examples: Legislation, administrative manuals, regulations, annual reports, articles published in learned journals, reports. . .

8. What are, if any, the weaknesses of your present system?
   (A) As far as legislation is concerned?
   (B) As far as administration is concerned?

9. How could these weaknesses be corrected?

10. What effect did the legislation and its administration have on the behaviour of:
    (A) Debtors
    (B) Creditors
    (C) Employees
    (D) Trustees and other administrators

11. If a new system to protect wages had to be designed for your country, what would you suggest? What pitfalls would you avoid?

12. Would you have other comments to make on the subject of wage protection?

APPENDIX 5

Statute Citations

1. Directors' Liability for Unpaid Wages

ALBERTA

The Companies Act, R.S.A. 1970, c. 60, s. 77;

Alberta Insurance Act, R.S.A. 1970, c. 187, s. 165;

Trust Companies Act, R.S.A. 1970, c. 372, s. 45

The Alberta Labour Act, S.A. 1973, c. 33, s. 45

BRITISH COLUMBIA

Employment Standards Act, R.S.B.C. 1979, c. 107, s. 125

MANITOBA

The Corporations Act, S.M. 1976, c. 40, s. 114;

The Cooperatives Act, S.M. 1976, c. 47, s. 80

The Payment of Wages Act, S.M. 1975, c. 21, s. 5

NOVA SCOTIA

The Loan Companies Act, R.S.N.S. 1967, c. 171, s. 79

Trust Companies Act, R.S.N.S. 1967, c. 316, s. 50

ONTARIO

The Corporations Act, R.S.O. 1970, c. 89, s. 82

Business Corporations Act, R.S.O. 1970, c. 53, s. 139

Loan and Trust Corporations Act, R.S.O. 1970, c. 254, s. 46

QUEBEC

The Companies Act, R.S.Q. 1977, c. C-38, s. 96

The Mining Companies Act, R.S.Q. 1977, c. C-47, s. 10

The Construction Industry Labour Relations Act, R.S.Q. 1977, c. R-20, s. 122(7)

SASKATCHEWAN

The Companies Act, R.S.S. 1978, c. C-23 c. 131, s. 112;

Business Corporations Act, R.S.S. 1978, c. B-10, s. 114;

Loan Companies Act, R.S.S. 1978, c. L-26, s. 79

Trust Companies Act, R.S.S. 1978, c. T-21, s. 54

The Labour Standards Act, R.S.S. 1978, c. L-1, s. 63

2. Bonding

ALBERTA

Industrial Wages Security Act, R.S.A. 1970, c. 184, s. 5

BRITISH COLUMBIA

Employment Standards Act, R.S.B.C. 1979, c. 107 s. 117

MANITOBA

Payment of Wages Act, S.M. 1975, c. 21, s. 12, as am. by 1977, c. 40, s. 3

Employment Standards Act, R.S.M. 1970, c. E-110, s. 22

NOVA SC0TIA

Labour Standards Code, S.N.S. 1972, c. 10, s. 80 as am. by 1976, c. 41, s. 19

3. Attachment of Debts

BRITISH COLUMBIA

Employment Standards Act, R.S.B.C. 1979, c. 107, s. 115

MANITOBA

Payment of Wages Act, S.M. 1975, c. 21, s. 13, as am. by 1977, c. 40, s. 4

N0VA SCOTIA

The Labour Standards Act, S.N.S. 1972, c. 10, s. 81

SASKATCHEWAN

The Labour Standards Act, R.S.S. 1978, c. L-1, c. 36, s. 54

4. Mechanics' and Builders' Liens

ALBERTA

The Builders' Lien Act, R.S.A. 1970, c. 35

BRITISH COLUMBIA

Builders Lien Act, R.S.B.C. 1979, c. 40

MANITOBA

Mechanics' Lien Act, R.S.M. 1970, c. M-80

NEW BRUNSWICK

Mechanics' Lien Act, R.S.N.B., 1973, c. M-6

NEWFOUNDLAND

Mechanics' Lien Act, R.S.N. 1970, c. 229

NOVA SCOTIA

Mechanics' Lien Act, R.S.N.S. 1967, c. 178

ONTARIO

Mechanics' Lien Act, R.S.O. 1970, c. 267

PRINCE EDWARD ISLAND

Mechanics' Lien Act, R.S.P.E.I. 1974, c. M-7

QUEBEC

Civil Code, ss. 2013, 2013a, 2013c, 2013d

SASKATCHEWAN

Mechanics' Lien Act, R.S.S. 1978, c. M-7, c. 62

5. Other Liens

ALBERTA

Woodmen's Lien Act, R.S.A. 1970, c. 396, s. 6

Possessory Liens Act, R.S.A. 1970, c. 279, s. 3

Warehousemen's Lien Act, R.S.A. 1970, c. 386, ss. 3, 4(b)

The Garagemen's Lien Act, R.S.A. 1970, c. 155, s. 3(1)

Beet Lien Act, R.S.A. 1970, c. 27, s. 2(2)(b)

Threshers' Lien Act, R.S.A. 1970, c. 363, s. 2(1), (2)

Harvesting Liens Act, R.S.A. 1970, c. 165, ss. 3, 2(a)(i)

BRITISH COLUMBIA

Woodmen's Lien for Wages Act, R.S.B.C. 1979, c. 436, s. 2(1)

Tug-Boat Worker Lien Act, R.S.B.C. 1979, c. 417, s. 4

Warehouse Lien Act, R.S.B.C. 1979, c. 427, s. 2(2)(b)

Builders Lien Act, R.S.B.C. 1979, c. 40, s. 6(4)(miners)

The Cattle Lien Act, R.S.B.C. 1960, c. 44, s. 3

MANITOBA

Woodmen's Lien Act, R.S.M. 1970, c. W-190, s. 3

Warehousemen's Liens Act, R.S.M. 1970, c. W-20, s. 3(1), (2)(b)

Garage Keepers Act, R.S.M. 1970, c. G-10, s. 3

Threshers' Liens Act, R.S.M. 1970, c. T-60, s. 3

NEW BRUNSWICK

Woodmen's Lien Act, R.S.N.B. 1973, c. W-12, s. 2(1)

Warehousemen's Lien Act, R.S.N.B. 1973, c. W-4, s. 2(1)

Liens on Goods and Chattels Act, R.S.N.B. 1973, c. L-6, s. 2

NEWFOUNDLAND

Warehousemen's Lien Act, R.S.N. 1970, c. 391, s. 3(1), (2)(b)

Judicature Act, R.S.N. 1970, c. 187, s. 224, 227, 231, 234

NOVA SCOTIA

Woodmen's Lien Act, R.S.N.S. 1967, c. 342, s. 3

Warehousemen's Lien Act, R.S.N.S. 1967, c. 334, s. 2(1), (2)(b)

The Mechanics' Lien Act, R.S.N.S. 1967, c. 178, s. 32 (miners)

ONTARIO

Woodmen's Lien For Wages Act, R.S.O. 1970, c. 504, s. 5

Warehousemen's Lien Act, R.S.O. 1970, c. 488, s. 2(1), (2)(b)

PRINCE EDWARD ISLAND

Warehousemen's Lien Act, R.S.P.E.I. 1974, c. W-1, s. 2(1), (2)(b)

Garage Keepers' Lien Act, R.S.P.E.I. 1974, c. G-1, ss. 2(1), 1(d)

QUEBEC

Civil Code, ss. 1994a (persons engaged to fish), 1994c (woodmen), 1994d (workmen in theatrical or other profit-making exhibitions)

SASKATCHEWAN

Woodmen's Lien Act, R.S.S. 1978, c. W-16, s. 4

Warehousemen's Lien Act, R.S.S. 1978, c. W-3, s. 3(1), (2)(b)

Garage Keepers Act, R.S.S. 1978, c. G-2, ss. 4, 2(b)

Threshers' Lien Act, R.S.S. 1978, c. T-13, s. 2

Thresher Employees Act, R.S.S. 1978, c. T-12, c. 282, s. 3

Statutory Preferences

A. Over Judgment Creditors

ALBERTA

Execution Creditors Act, R.S.A. 1970, c. 128, s. 16(1), (2)

BRITISH COLUMBIA

Execution Act, R.S.B.C. 1979, c. 75, s. 46

MANITOBA

Executions Act, R.S.M. 1970, c. E-160, ss. 9, 10.

NEW BRUNSWICK

Wage Earners Protection Act, R.S.N.B. 1973, c. W-1, ss. 2-6

NOVA SC0TIA

Creditors' Relief Act, R.S.N.S. 1967, c. 70, s. 23

SASKATCHEWAN

Creditors Relief Act, R.S.S. 1978, c. C-46, s. 15(1)

B. Under Dissolution, Winding-Up and Insolvencies of Companies

ALBERTA

Companies Act, R.S.A. 1970, c. 60, s. 266(1)(b), (c)

Cooperative Associations Act, R.S.A. 1970, c. 67, s. 47(2)

Credit Unions Act, R.S.A. 1970, c. 74, s. 75(6)

MANITOBA

Credit Unions Act, S.M. 1970, c. 53, s. 146(2)

PRINCE EDWARD ISLAND

Cooperative Associations Act, S.P.E.I. 1976, c. 7, s. 53

Credit Union Act, R.S.P.E.I. 1974, c. C-28, s. 21.1 as am. by 1976, c. 8, s. 5(1)

Winding-Up Act, R.S.P.E.I. 1974, c. W-7, s. 9(b)

NEWFOUNDLAND

Companies Act, R.S.N. 1970, c. 54, s. 229

NOVA SCOTIA

Cooperative Associations Act, S.N.S. 1977, c. 7, s. 54

ONTARIO

Corporations Act, R.S.O. 1970, c. 89, s. 284 (1)(b)

Business Corporations Act, R.S.O. 1970, c. 53, s. 231 (1)(b)

Credit Unions and Caisses Populaires Act, S.O. 1976, c. 62, s. 125(b)

Cooperative Corporations Act, S.O. 1973, c. 101, s. 161

SASKATCHEWAN

Companies Act, R.S.S. 1978, c. C-23, s. 236(1)(a)

Companies Winding-Up Act, R.S.S. 1978, c. C-24, s. 10

Co-operative Associations Act, R.S.S. 1978, c. C-34, s. 112

Credit Union Act, R.S.S. 1978, c. C-45, s. 100

C. New (General Wages)

ALBERTA

Labour Act, S.A. 1973, c. 33, s. 48

NEWFOUNDLAND

Labour Standards Act, S.N. 1977, c. 52, s. 37

NEW BRUNSWICK

Wage Earners' Protection Act, R.S.N.B. 1973, c. W-1, ss. 2-6

ONTARIO

Employment Standards Act, S.O. 1974, c. 112, s. 14

PRINCE EDWARD ISLAND

Labour Act, R.S.P.E.I. 1974, c. L-1, s. 78

D. Other

QUEBEC

Civil Code, ss. 1994.9, 2006 (Domestic servants and railway employees)

Security Interests

A. Lien and Charge

BRITISH COLUMBIA

Employment Standards Act, R.S.B.C. 1979, c. 107, s. 114

MANITOBA

Payment of Wages Act, S.M. 1975, c. 21, s. 7 as am. by 1976, c. 69, s. 35, 1978, c. 18, ss. 2 and 6

NOVA SCOTIA

Labour Standards Code, S.N.S. 1972, c. 10, s. 84 as am. by 1975, c. 50, s. 3 and 1976, c. 41, s. 21

QUEBEC

Civil Code, ss. 1994a, 1994c, 1994d, 2013, 2013a, 2013c, 2013d

B. Statutory Trust

MANITOBA

Vacation With Pay Act, R.S.M. 1970, c. V-20, s. 19(2), as am. by 1977, c. 37, s. 3

NOVA SCOTIA

Labour Standards Code, S.N.S. 1972, c. 10, s. 34 as am. by 1975, c. 50, s. 2

ONTARIO

Employment Standards Act, S.O. 1974, c. 112, s. 15

PRINCE EDWARD ISLAND

Labour Act, R.S.P.E.I. 1974, c. L-1, s. 65

SASKATCHEWAN

Labour Standards Act, R.S.S. 1978, c. L-1, s. 56

C. Statutory Mortgage

NOVA SCOTIA

Labour Standards Code, S.N.S. 1972, c. 10, s. 84, as am. by 1975, c. 50, s. 3 and 1976, c. 41, s. 21

Funds

MANITOBA

Payment of Wages Act, S.M. 1975, c. 21, s. 19

QUEBEC

The Labour Standards Act, S.Q. 1979, c. 45, ss. 29(4), 29(5), 136, 137, 138

The Construction Industry Labour Relations Act, R.S.Q. 1977, c. R- 20, s. 122(7) (wages paid by l'Office de la Construction du Québec)

Third Party's Liability for Unpaid Wages

QUEBEC

The Minimum Wage Act, R.S.Q. 1977, c. S-1, s. 27 ("professional employer")

APPENDIX 6

RECEIVERSHIP DATA

Note: These data were gathered from the receivership record form (CCA-1619) which is voluntarily submitted by trustees administering receiverships. The data are quite different from the bankruptcy data in that they represent an unknown proportion of the total population of receiverships over the period 1977-1980. The statistical reliability of these data, therefore, cannot be calculated and must be assumed to be low.

These facts must be borne in mind when reading the tables below. The quantitative data cannot be generalized to receiverships as a whole and there is no basis for determining the relationship of these summary statistics to those of the population of receiverships.

These data were gathered as part of the empirical study made by Canadian Facts Ltd.

TYPE OF INDUSTRY INVOLVED BASE ALL RECEIVERSHIPS BY YEAR RECEIVER APPOINTED

	Total	1975	1976	1977	1978	1979	1980	1981	Not Stated
Base for Percentages	1151	1	6	77	453	373	228	5	8
	%	%	%	%	%	%	%	%	%
Type of Industry Primary	3	–	–	4	2	2	6	–	–
Manufacturing	31	–	67	26	33	31	32	–	50
Construction	7	100	–	14.3	5.7	8.6	3.9	20	12.5
Financial, Insurance and Real Estate	6	–	–	1	8	6	4	1	13
Transportation, Communication and Utilities	2	–	–	1	2	2	4	20	–
Trade	34	–	33	38	33	31	36	60	25
Services	16	–	–	16	16	18	14	–	–
Others and not Specified	1	–	–	–	1	1	1	–	–

*Percentages may not sum to 100 due to rounding

LOSS IN VALUE OF MONTHLY PAYROLL BEFORE AND AFTER RECEIVERSHIP
BASE ALL RECEIVERSHIPS
BY TYPE OF INDUSTRY INVOLVED

	Total	Primary	Manufac-turing	Construction		Financ Insur. Real Estate	Transpt Comm Utilit.	Trade		Total Services	Other and not Specif.
				General	Special Trade			Whole-sale	Retail		
Sample size	1151	36	361	32	49	69	28	126	260	183	7
	$	$	$	$	$	$	$	$	$	$	$
Total value	8364112	296800	4952555	263500	648020	73200	172450	723490	662072	570725	1300
Average value per receivership excluding where no loss/change	16273	37100	25140	20269	24924	9150	15677	9911	5659	9512	1300
Average value per receivership overall	9703	10993	17688	11977	19637	1220	8212	6890	3598	4603	217
Average value per lost employee	771	1232	865	562	1071	148	1052	1018	384	807	325

APPROXIMATE NUMBER OF EMPLOYEES PRIOR TO RECEIVERSHIP
BASE ALL RECEIVERSHIPS
BY TYPE OF INDUSTRY INVOLVED

	Total	Primary	Manufac-turing	Construction		Financ Insur. Real Estate	Transpt Comm Utilit.	Trade		Total Services	Other and not Specif.
				General	Special Trade			Whole-sale	Retail		
Base for Percentages	1151	36	361	32	49	69	28	126	260	183	7
Number of Employees:											
NONE	19	31	12	22	12	65	25	15	13	22	71
1 TO 2	10	19	4	16	8	16	18	9	18	8	–
3 TO 5	17	17	12	9	12	3	7	28	27	17	14
6 TO 10	14	6	13	13	29	1	18	21	14	18	–
11 TO 20	14	6	21	19	12	3	18	10	10	12	–
21 TO 50	9	8	16	9	16	4	7	6	5	8	–
51 TO 100	6	6	11	6	2	1	–	2	3	1	–
101 TO 200	2	–	4	–	4	–	–	2	–	1	–
201 TO 300	1	–	1	3	–	–	–	–	1	0	–
301 TO 700	–	–	–	–	–	1	–	–	1	0	–
NOT STATED	9	8	8	7	4	4	7	7	9	16	14
Total Number of Individuals	18574	372	9667	545	940	657	196	1306	3540	1347	4
Average Number per Receivership	18	11	29	18	20		10	8	11	15	1

APPENDIX 7

RESULTS FROM PROVINCIAL QUESTIONNAIRES

Empirical data were supplied by six provinces. Because the time periods covered differ greatly, all figures will be shown in annual form. The data generally cover non-bankruptcy insolvencies but their character and representativeness is unknown. Therefore, the numbers presented should be interpreted with extreme caution.

NEWFOUNDLAND

Aug. 1, 1979 – Dec. 31, 1980, 61 insolvencies, 811 employees

		per employee	per insolvency
annual wage claim	$241,000	$422	$5607
annual wage payment	$138,822	$242	$3224
annual wage loss	$102,178	$180	$2383

NOVA SCOTIA

Nov. 1, 1978 – Mar. 31, 1980, 79 insolvencies, 309 employees

annual wage losses	$ 46,615	per employee	per insolvency
		$209	$ 818

NEW BRUNSWICK

Year	insolvencies	employees unpaid wages		per employee	per insolvency
1976	3	13	$ 2,229	$171	$ 743
1977	5	40	8,118	203	1623
1978	5	47	8,861	189	1772
1979	4	61	13,869	227	3467

QUEBEC

Construction only

year	wage paid out	insolvencies	pay out per insolvency
1976	$ 934,000	132	$7,076
1977	893,000	109	8,193
1978	1,378,000	191	6,901
1979	1,976,000	195	10,133
1980	1,521,945	223	6,825

MANITOBA

1977 1978 1979

average annual wage claims	$653,000	Losses per employee
average annual pay outs	$539,000	$629
average annual losses	$114,000	

BRITISH COLUMBIA

Wage adjustments in all insolvencies
1975 $1,414,535
1976 $1,752,234
1977 $2,096,536
1978 $2,119,628
1979 $1,953,512

Only one conclusion can be made from examining these data: if a thorough understanding of non-bankruptcy business insolvencies is to be achieved, a uniform system of describing them must be developed.

APPENDIX 8

REPORT HIGHLIGHTS

1. The goals of a new wage protection system should be to ultimately provide total, certain and speedy recovery by employees of all unpaid employment-related claims arising in the context of bankruptcy and insolvency.

2. The means for pursuing those goals are dependent on the size of the problem and on a better co-ordination and harmonization of federal and provincial laws designed to protect wage earners claims.

3. During a three year period, it is recommended that, under federal leadership, the design of a permanent solution to the problem of unpaid wages be undertaken through the co-operative efforts of the federal and provincial levels of government.

4. A permanent wage protection system should combine preventive measures to reduce the problem (for example, better pension fund regulations) and remedial measures that draw on a separate fund to pay wage claims.

5. A permanent form of wage protection should not further alter the order of priority under the Bankruptcy Act because it would not offer the necessary guarantees of payment to employees, could affect lending practices and, contrary to a primary purpose of that Act, could unduly disrupt the orderly distribution of an insolvent employer's property.

6. The multiplicity of federal and provincial statutes should be replaced, under a permanent solution, by a comprehensive wage protection system designed to achieve the following:

   a) all employees should be covered under the new system;

b) the total "wage package" should be protected;

c) the new system should cover all insolvencies;

d) the new system should assure the payment of outstanding unpaid wage claims (certainty of payment);

e) the payment of outstanding wage claims should be promptly made;

f) there should be consistency of application of the new system across Canada;

g) the financing of the system should be made out of a separate pool of assets.

7. Pending the gathering of the necessary data on the extent of the problem of unpaid wages and for a maximum period of three years, an interim and partial solution should be implemented under Bill C-12, presently before Parliament, and be designed to achieve the following:

   a) employee unpaid wages, including fringe benefits, up to a maximum amount of $1,000.00, should be covered by the Federal Consolidated Revenue Fund;

   b) the Superintendent of Bankruptcy, in conjunction with private trustees and receivers, should be responsible for the administration of this interim solution;

   c) in order to finance this interim solution, the priority of the Crown in right of Canada under the present Bankruptcy Act should be retained;

   d) to supplement the $1,000.00 coverage and to apportion some of the cost of wage protection, the priority of employees' claims over unsecured debts, as well as the director's liability should be retained under Bill C-12.